Supreme Court, U.S.
FILED
NOV 15 1990
JOSEPH F. SPANIOL, JR.
CLERK

90-768

No. (1)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

CONRAD PETER,

Petitioner,

v.

HESS OIL VIRGIN ISLANDS CORPORATION,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does Section 905(a) of the Longshore and Harbor Workers' Compensation Act preempt a maritime worker's state or territorial tort action against his "borrowed employer" for injuries occurring in the "twilight zone" of concurrent state and federal jurisdiction, where the relevant state or territorial compensation statute does not incorporate any borrowed servant doctrine and does not grant immunity from tort suit to a maritime worker's borrowed employer?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Conrad Peter respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit, entered in the above-entitled proceeding.

OPINIONS BELOW

The opinion of the Court of Appeals for the Third Circuit, entered on May 17, 1990, is reported at 903 F.2d 935, and is reprinted in the Appendix to this petition at 1a.

The judgment of the District Court of the Virgin Islands, entered on October 31, 1988, is unpublished and is reprinted at 44a. The Order of the District Court denying respondent's motion for summary judgment, entered on October 31, 1988, is unpublished and is reprinted at 45a.

JURISDICTION

Invoking jurisdiction under 48 U.S.C. Sec. 1612 and 4 V.I.C. Sec. 32, petitioner brought this suit in the United States District Court of the Virgin Islands. On cross-appeals, the Third Circuit invoked its jurisdiction under 28 U.S.C. Secs. 1291 and 1294(3) and reversed in an opinion entered on May 17, 1990. The Third Circuit denied a timely petition for rehearing or rehearing en banc on August 17, 1990. Jurisdiction is conferred on this Court by 28 U.S.C. Sec. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause of the United States Constitution, art. VI, cl. 2, provides:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

The Longshore and Harbor Workers' Compensation Act ("LHWCA" or the "Act") is codified at 33 U.S.C. Sec. 901 *et seq.*; Section 903(a), provides:

> "Except as otherwise provided in this section, compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United

States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel)."

Section 904 provides:

"(a) Every employer shall be liable for and shall secure the payment to his employees of the compensation payable under sections 907, 908, and 909 of this title. In the case of an employer who is a subcontractor, only if such subcontractor fails to secure the payment of compensation shall the contractor be liable for and be required to secure the payment of compensation. A subcontractor shall not be deemed to have failed to secure the payment of compensation if the contractor has provided insurance for such compensation for the benefit of the subcontractor."

(b) Compensation shall be payable irrespective of fault as a cause for the injury."

Section 905(a) provides, in relevant part:

"The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under the chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death."

Section 933(i) provides:

"The right to compensation or benefits under this chapter shall be the exclusive remedy to an employee when he is injured, or to his eligible survivors or

> legal representatives if he is killed, by the negligence or wrong of any other person or persons in the same employ: *Provided*, That this provision shall not affect the liability of a person other than an officer or employee of the employer."

Section 263a of the Virgin Islands Workmen's Compensation Act, 24 V.I.C. Sec. 263a, provides:

> "It shall not be a defense to any action brought by or on behalf of an employee, that the employee at the time of his injury or death was the borrowed, loaned, or rented employee of another employer. Any oral or written agreement between an employer and employee which makes the employee the borrowed, loaned or rented employee of another employer shall be null and void as being against the public policy of this Territory."

STATEMENT OF THE CASE

LHWCA is silent on the issue of preemption of state remedies. This case involves the Third Circuit's conclusion that Section 905(a) of LHWCA preempts state law tort actions brought by maritime workers against their employers, although it does *not* bar the same workers' recovery of state statutory compensation from their employers.

Petitioner Conrad Peter brought a negligence action under Virgin Islands law against respondent, the Hess Oil Virgin Islands Corporation ("HOVIC"), for its negligent failure to take reasonable safety measures to protect Mr. Peter from injurious exposure to jet fuel and fuel fumes while working with fuel hoses at HOVIC's St. Croix petroleum refinery. Mr. Peter worked for HOVIC pursuant to a contractual agreement between HOVIC and Litwin Panamerican Corporation ("Litwin"), under which Litwin supplied personnel for general maintenance and turnaround work at HOVIC's refinery. Litwin was contractually required to pay Peter's salary and provide him with workmen's compensation

insurance. HOVIC was contractually entitled to control, direct and supervise Peter's work.

Peter performed a variety of jobs for HOVIC. He spent part of his time tending to maintenance chores on and around the dock. In addition, Peter performed tasks involving hoses that carried kerosene-based jet fuel from the pier to cargo ships docked at HOVIC's refinery. During this work, Peter was not equipped with a face shield or other respiratory protection. One of Peter's jobs was to connect and disconnect the fuel hoses to ships while standing on the ship's deck. The testimony at trial showed that during this task, Peter was exposed to and was often sprayed with jet fuel, causing him to inhale strong fumes and ingest fuel. In addition, Peter worked on the dock performing the "hose around" task: removing the flange from the end of the hose and flushing the line of any product from a previous job. Peter's co-worker testified that Peter was splashed and sprayed with jet fuel during the hose around, and actually swallowed fuel.

After a three-day trial, the jury entered a verdict against HOVIC and found that as a result of his exposure to fuel and fumes, Peter suffered permanent lung injuries. The jury assessed Peter's damage at $1.5 million, which was reduced to $1.2 million because of contributory negligence. *See* p. 43a.

After trial, the District Court considered and denied HOVIC's motion for summary judgment. The District Court concluded that LHWCA's so-called "borrowed servant" defense was not available to HOVIC in Peter's action based on territorial law. HOVIC had argued that Peter's injuries were covered by LHWCA, that Peter was HOVIC's "borrowed servant," and that HOVIC was Peter's employer for purposes of the Act. HOVIC maintained, accordingly, that it was entitled to immunity from Peter's state tort suit under Section 905(a) of LHWCA which provides, in relevant part, that "[t]he

liability of an employer [under LHWCA] shall be exclusive and in place of all other liability of such employer to the employee." In rejecting HOVIC's argument, the District Court held that LHWCA does not provide the exclusive remedy for Peter's injury and therefore does not preempt Virgin Islands tort law. *See* p. 45a.[1]

Both parties appealed, raising numerous issues. The Third Circuit addressed only one issue: HOVIC's contention that the District Court's judgment must be reversed because allowing Peter a tort remedy under Virgin Islands law conflicts with LHWCA. The Third Circuit separated this claim into several sub-issues. The court first concluded that Peter was exposed to jet fuel and its fumes while working both on the dock and aboard ship. 903 F.2d at 938; 6a. The court then found that Peter's injuries fell within the scope of LHWCA, which provides compensation to certain employees for:

> "disability or death . . . if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading or unloading, repairing, or building a vessel)."

33 U.S.C. Sec. 903(a). 903 F.2d at 938; 5a. The Third Circuit then concluded that the "borrowed servant" doctrine applies to LHWCA. Thus, "borrowing employers" are liable for compensation for injuries suffered by their borrowed employees and are therefore entitled to any immunity afforded by Section 905(a) of the Act. 903 F.2d at 939-941; 7a-12a. Examining the record, the court found that Peter was HOVIC's borrowed employee and that HOVIC was therefore Peter's employer for purposes of LHWCA. 903 F.2d at 942-943; 14a-15a.

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[1] The District Court subsequently denied HOVIC's two motions for judgment notwithstanding the verdict, or alternatively for a new trial or remittitur. *See* pp. 48a, 52a.

The Third Circuit then turned to the issue of whether Section 905(a) bars Peter's state tort law remedy against HOVIC. This issue, the court recognized, is complicated by the peculiar history of LHWCA, which has resulted in the development of three jurisdictional areas in which marine-related injuries, such as Peter's, might fall: one of exclusive federal jurisdiction, one of exclusive state jurisdiction, and one of concurrent jurisdiction.[2] *See* 903 F.2d at 943-950; 15a-30a.

The exclusive federal jurisdiction stems from this Court's holding in 1917 that, even though Congress had not enacted any federal remedy, a state compensation law could not constitutionally be applied to a longshoreman who was killed or injured over navigable waters. *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917).[3] Soon thereafter, however, the Court confirmed that state law could constitutionally apply to longshoremen injured on land. *State Industrial Comm'n v. Nordenholt Corp.*, 259 U.S. 263 (1922). Over time, this Court softened the "*Jensen* line" somewhat, allowing States to extend their compensation coverage schemes to circumstances that were "maritime but local" in character. *See Western Fuel Co. v. Garcia*, 257 U.S. 233 (1921).[4]

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[2] At the seaward extreme, non-local maritime injuries fall exclusively under LHWCA; the States are constitutionally barred from providing redress for such injuries. At the other extreme, beyond the 1972 landward extension of LHWCA, state law alone controls. In the "twilight zone," "maritime but local" injuries can be compensated under either state or federal law.

[3] The *Jensen* Court reasoned that the constitutional grant of admiralty jurisdiction to the federal courts, art. III, sec. 2, requires a nationally uniform system of maritime law pertaining to injuries over navigable waters.

[4] Congress favored broad state power over longshoremen. In fact, Congress even sought to authorize States to apply their compensation statutes to injuries seaward of the *Jensen* line, but those attempts were struck down as unlawful delegations of congresssional power. *See e.g., Washington v. W.C. Dawson & Co.*, 264 U.S. 219 (1924).

In 1927, Congress passed LHWCA "to fill the void created by the inability of the States to remedy injuries over navigable waters." *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 258 (1977). Thus, in its original version, LHWCA's coverage stopped at the shoreline or, more specifically, at the "maritime but local" line, providing compensation only for injuries occurring "on the navigable waters," and only if compensation under state law was unavailable. Pub. L. No. 69-803, ch. 509, Sec. 3(a), 44 Stat. 1424, 1426 (1927). Because of the fact-based nature of the "maritime but local" doctrine, however, the line of demarcation between the two jurisdictional spheres was "shrouded in impenetrable confusion." G. Gilmore & C. Black, Law of Admiralty 409 (2d ed. 1975). Of particular concern was the "twilight zone," where many injured maritime workers fell through the jurisdictional cracks and were denied compensation of any sort. *Davis v. Department of Labor & Industries*, 317 U.S. 249, 256 (1942).[5] This dilemma was resolved by extending state jurisdiction.

Thus, in *Davis*, this Court ruled the twilight zone an area "of *concurrent jurisdiction* where LHWCA coverage was available" but state law was nevertheless constitutional. *Director, OWCP v. Perini North River Assoc.*, 459 U.S. 297, 309 (1983) (emphasis added). And in *Calbeck v. Travelers Ins. Co.*, 370 U.S. 114 (1962), this Court made clear that all "maritime but local" cases fall within the twilight zone and are "compensable under either state or federal law." *Director, OWCP v. Perini North River Assoc.*, 459 U.S. at 309 n.19. However, LHWCA's reach still stopped at the water's edge.

In 1972, Congress extended the coverage of LHWCA shoreward by amending the Act's coverage provision to

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[5] The "twilight zone" described "water front cases involving aspects pertaining both to the land and to the sea." *Moores' Case*, 232 Mass. 162, 80 N.E.2d 478, 481, *aff'd sub nom. Bethlehem Steel Co. v. Moore*, 335 U.S. 874 (1948) (*per curiam*).

its current form. *See* 33 U.S.C. Sec. 903(a). In *Sun Ship, Inc. v. Pennsylvania*, 447 U.S. 715 (1980), this Court unanimously held that this extension did not preempt state law regarding injuries newly covered by LHWCA:

> "Given that the pre-1972 Longshoremen's Act ran concurrently with state remedies in the 'maritime but local' zone, it follows that the post-1972 expansion of the Act landward would be concurrent as well. For state regulation of worker injuries is even more clearly appropriate ashore than it is upon navigable waters. . . . The language of the 1972 amendments cannot fairly be understood as preempting state workers' remedies from the field of the LHWCA. . . . Nor does the legislative history suggest a congressional decision to exclude state laws from the terrain newly occupied by the post-1972 Longshoremen's Act."

Id. at 720-722. In other words, when LHWCA came ashore in 1972, the twilight zone followed, and workers injured on land, yet who fall within LHWCA, are within the twilight zone and may pursue federal or state remedies.

Having review this history, the Third Circuit correctly concluded that Peter's injuries fall within the twilight zone of concurrent jurisdiction newly created by the 1972 amendments, "since substantial portions of the injury-causing exposure occurred on the dock." 903 F.2d at 950; 30a. Accordingly, the court held that although Peter was covered by LHWCA, the Virgin Islands could also provide a workmen's compensation remedy. *Id.*[6]

The Third Circuit ruled, however, that the Virgin Islands could not provide Peter with a *tort* remedy for damages. The court recognized that the Virgin Islands

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[6] The court thus correctly rejected HOVIC's claim that under *Jensen*, federal maritime law preempts application of *any* state law to Peter's injury. 903 F.2d at 950; 31a.

legislature had explicitly abrogated the borrowed employee doctrine in *its* Workmen's Compensation Act, 24 V.I.C. Sec. 263a, thereby depriving HOVIC of any immunity under territorial law from Peter's negligence claim. 902 F.2d at 939; 8a. And the court acknowledged this Court's instruction not to invalidate state regulation in the admiralty area, "absent a clear conflict with the federal law." *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325, 341 (1973). *See* 903 F.2d at 851; 32a. Although the Act says nothing whatsoever about preempting or displacing state law, the court concluded that Section 905(a) of LHWCA "was intended by Congress to confer immunity on an employer from state as well as federal negligence liability." 903 F.2d at 951; 32a.

The Third Circuit denied that this Court's decisions in *Sun Ship* or *Hahn v. Ross Island Sand & Gravel*, 358 U.S. 272 (1959) (*per curiam*), had any bearing on the preemption issue. In *Hahn*, this Court applied *Davis* to permit a state *tort* remedy brought against an employer by a worker injured while working on a barge in a lagoon opening into navigable waters— *i.e.*, within the twilight zone. The employer had secured compensation for the worker under LHWCA but had elected not to be covered by Oregon workmen's compensation law. The state statute provided that where the employer makes such an election, the injured employee may maintain a negligence action for damages. The *Hahn* Court held that "the Longshoremen's Act did not bare [the employee's] claim under state law. . . . Since this case is within the 'twilight zone,' it follows from what we held in *Davis* that nothing in the Longshoremen's Act or the United States Constitution prevents recovery." *Id.* at 273.

Citing two Fifth Circuit decisions, the Third Circuit held that "where an employer has obtained workmen's compensation coverage for its LHWCA employee under both the LHWCA and the state or territorial statute, § 905(a) and the Supremacy Clause bar a state or ter-

ritorial tort recovery against the employer." 903 F.2d at 953; 36a. The court noted that two state Supreme Courts have reached conflicting results regarding the preemptive effect of LHWCA in circumstances nearly identical to those presented here. 903 F.2d at 952 n.17; 34a.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CONFLICTS WITH CONGRESSIONAL INTENT AND IS IN DIRECT CONFLICT WITH PRIOR DECISIONS OF THIS COURT WHICH HAVE HELD THAT LHWCA DOES NOT SUPPLANT STATE LAW REMEDIES AVAILABLE TO MARITIME WORKERS INJURED IN THE "TWILIGHT ZONE."

The Third Circuit decided an important question involving the preemptive scope of LHWCA, in a way that conflicts with this Court's decision in *Sun Ship, Inc. v. Pennsylvania*, 447 U.S. 715 (1980), and *Hahn v. Ross Island Sand and Gravel Co.*, 358 U.S. 272 (1959) (*per curiam*).[7] As this Court has repeatedly ruled, LHWCA permits state remedies—without limitation—for workers injured in the "twilight zone." There is no dispute that Peter's injury falls within this zone. *See* 903 F.2d at 950; 30a. Nor is there any question that Virgin Islands

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[7] The Third Circuit relied upon two Fifth Circuit decisions, *Rosetti v. Avondale Shipyards, Inc.*, 821 F.2d 1083 (5th Cir. 1987) (*per curiam*), *cert. denied*, 484 U.S. 1008 (1988), and *Lorton v. Diamond M Drilling Co.*, 540 F.2d 212 (5th Cir. 1976) (*per curiam*). *See* 903 F.2d at 952; 34a. But it is not at all clear that the Fifth Circuit addressed the issue presented here in those cases. Neither the *Rosetti* nor the *Lorton* court indicates or discusses whether the case comes within the twilight zone. *See, e.g., Rosetti*, 821 F.2d at 1084 (explaining that the injury occurred on a boat hull "afloat on navigable waters," which suggests the case falls within exclusive federal jurisdiction). Moreover, both of those cryptic, *per curiam* opinions never discuss, or even allude to, the recognized concurrent state and federal jurisdiction or this Court's *Sun Ship* decision. Therefore, to the extent those decisions are on point, what little reasoning they offer is mistaken.

law permits his tort action against HOVIC. *See* 24 V.I.C. § 263a (1984). Thus, Section 905(a) of LHWCA does not render HOVIC immune from Peter's suit.

In *Sun Ship*, this Court held that "the 1972 extension of federal jurisdiction *supplements, rather than supplants*, state compensation law." 447 U.S. at 720 (emphasis added). The Court reasoned that "[t]he language of the 1972 amendments cannot fairly be understood as preempting state workers' remedies from the field of the LHWCA." *Id.* The Court ruled that Section 903(a) of the Act, as amended in 1972, "*contemplat[es] concurrent jurisdiction.*" *Id.* at 720-721 (ruling that LHWCA and state remedies operate "within the same ambit") (emphasis added).[8] Significantly, the Court concluded that in enacting the 1972 amendments to the Act, Congress did *not* intend Section 905(a) of LHWCA to exclude "remedies offered by other jursidictions." *Id.* at 722 n.4. Rather, Congress intended that "federal law provide[] a concurrent or supplementary route to compensation" and that it *not* preempt local law in this area. *Id* at 722.[9]

The Third Circuit's conclusion that Congress intended Section 905(a) to preempt state *tort* relief—but not relief under state *statutory compensation* laws—for a worker whose injury falls within the twilight zone, is fatally inconsistent with *Sun Ship*. Nothing in this Court's *Sun Ship* opinion suggests any distinction between these two types of state remedy. Rather, the Court's decision speaks only of the distinction between

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[8] The Court stressed that the amendment's legislative history does *not* suggest "a congressional decision to exclude state laws from the terrain newly occupied by the post-1972 Longshoremen's Act." 447 U.S. at 721.

[9] Thus, the Third Circuit was clearly mistaken in its conclusion that "[c]oncurrent jurisdiction in the 'twilight zone' is a judicial construct." 903 F.2d at 952; 35a. In *Sun Ship*, this Court held that the creation of concurrent jurisdiction was *Congress'* intent in enacting the 1972 amendments to LHWCA.

state remedies and federal remedies and concludes that Congress intended *both* to be available to workers injured in the twilight zone.

That LHWCA does not preempt state tort remedies for injuries occurring in the twilight zone was made clear in this Court's earlier decision in *Hahn v. Ross Island Sand & Gravel Co., supra.*[10] In *Hahn*, the Court held that a worker injured in the twilight zone could sue his employer under state negligence law, even if his employer carried LHWCA insurance, if the state compensation statute offered his employer no immunity. This principle, of course, directly supports Peter's cause of action: the Virgin Islands Compensation Act provides no immunity to HOVIC from a tort claim by Peter.

The Third Circuit unsuccessfully attempted to distinguish *Hahn* on two grounds: (1) the state tort liability in *Hahn* "was imposed only as a sanction for the employer's failure to secure coverage" and (2) "the state negligence liability was part of the state's workmen's compensation scheme." 903 F.2d at 953; 36a. But there is no language whatsoever in the *Hahn* decision suggesting that state tort relief was permitted only as a penalty. And Peter's right to sue HOVIC is as much a part of the Virgin Islands workmen's compensation scheme as was the local cause of action permitted in *Hahn*: Section 263a of the Virgin Islands Workmen's Compensation Act explicitly denies immunity to "borrowing employers" such as HOVIC. Indeed, the Virgin Islands legislature specifically enacted Section 263a to overrule a Third Circuit

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[10] The Court's decision in *Hahn* pre-dated the 1972 amendments to the Act, but was based on principles developed in *Davis v. Dept. of Labor, supra*, regarding the application of LHWCA to cases within the twilight zone. In *Sun Ship*, the Court ruled that Congress acquiesced in these principles in enacting the 1972 amendments. *See* 447 U.S. at 720-721. Accordingly, *Hahn* continues to provide controlling precedent for twilight zone cases such as this case.

decision that had interpreted the Territory's workmens' compensation law as *not* permitting such tort actions. *See* 903 F.2d at 939; 7a-8a (discussing *Vanterpool v. Hess Oil V.I. Corp.*, 766 F.2d 117 (3d Cir. 1985), *cert. denied*, 474 U.S. 1059 (1986)).

The Third Circuit based its decision solely on its misperception of an "unmistakable intention" evidenced in the *language* of Section 905(a) to codify a *quid pro quo* that "the employer provides no-fault compensation in exchange for immunity from tort liability for damages," 903 F.2d at 951; 33a, even though the language of Section 905(a) does not address that point at all.[11] There is simply no evidence—and the court cited none—that by extending LHWCA (including Section 905(a)) landward into the arena traditionally within the States' exclusive control, Congress intended to exclude state tort remedies *which had been available to workers prior to 1972*. To the contrary, this Court held in *Sun Ship* that "the *quid pro quo* to the employers . . . was *simply* abolition of the longshoremen's unseaworthiness remedy," which is a non-LHWCA *federal remedy*. 447 U.S. at 724 (emphasis added).[12] *Accord* 4 A. Larson, Workmen's Compensation

[11] There is a strong presumption against implied federal preemption. *E.g., Rice v. Sante Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). In admiralty, as in other areas of the law, when a federal act may "intrude on an area that has heretofore been reserved for state law" courts must "proceed with caution," implying federal preemption only upon a "clear indication that Congress [so] intended." *Askew v. American Waterways Operations, Inc.*, 411 U.S. at 341 (quoting *Victory Carriers, Inc. v. Law*, 404 U.S. 202, 212 (1971)). LHWCA is entirely silent on the issue of preemption of state tort actions against employers.

[12] Prior to the 1972 amendments to the Act, longshoremen were permitted, under *federal* maritime law, to bring damage suits against vessels (and shipowners) for injuries caused by the "unseaworthiness" of the ship. *See, e.g., Seas Shipping Co. v. Sieracki*, 328 U.S. 85 (1946). The 1972 amendments replaced the federal unseaworthiness action with a LHWCA negligence claim against the shipowner, and precluded the shipowner from being indemnified by the employer. *See*, 33 U.S.C. Sec. 905(b).

Law § 89.27(b) at 16-241 (1990) (hereafter "Larson"). In so holding, this Court noted, as significant, that "in their discussion of advantages to employers under the 1972 amendments, the bill Reports . . . do not mention pre-emption of *state remedies*." 447 U.S. at 724-25 (emphasis added).

The Third Circuit incorrectly believed that Congress intended to preclude workers from recovering actual damages from their employers pursuant to state negligence actions instead of (presumably) lower fixed benefits under no-fault compensation law. *See* 903 F.2d at 951; 33a. As Professor Larson has explained, Congress intended "to guarantee a federal remedy of a certain minimum size" to injured workers. 4 Larson, § 89.71 at 16-406. *See Director, OWCP v. Perini North River Assoc.*, 459 U.S. at 317-318; *Sun Ship*, 447 U.S. at 723.[13] But Congress' desire to provide uniform, *minimum* federal compensation benefits does not imply an intent to preclude States from offering better or different remedies. As this Court explained in *Sun Ship*, there is "no evidence that Congress was concerned about a disparity between adequate federal benefits and *superior* state benefits." 447 U.S. at 724 (emphasis in original). Indeed, the notion that Congress intended to obliterate state tort remedies for workers injured in the twilight zone is fundamentally at odds with the acknowledged remedial purpose of the revised Act: "the amendments' framers acted out of solicitude for the workers." *Id.* at 726. *See also* 4 Larson § 89.60 at 16-401 (discussing *Hahn* and noting that "the twilight doctrine was designed to enlarge the claimant's rights, not to cut them down").

It is critical for this Court to correct the Third Circuit's egregious departure from this Court's *Sun Ship*

[13] Congress also wished to avoid the problem of harbor workers walking in and out of federal coverage in going between a pier and a ship. *See Perini*, 459 U.S. at 317-318.

and *Hahn* decisions and its misinterpretation of congressional intent. The States and Territories have an important interest in protecting their citizens injured while performing hazardous maritime work on their inland waters and adjacent land. In shaping its workmen's compensation scheme, each State (or Territory) exercises its legitimate policy-making authority and responsibility in determining the extent to which local statutory compensation relief will preclude local tort claims for injuries sustained within its jurisdiction. The Third Circuit's implicit suggestion that Congress meant, without further guidance, to permit some policy decisions (such as Oregon's, which was at issue in *Hahn*) but to override others (such as the Virgin Islands' policy decision) is untenable. Such a rule would put Congress and the courts in the unaccustomed and unseemly role of deciding which state policy decisions are wise and should be respected, and which are not.[14] This Court's decisions in *Sun Ship* and *Hahn* unequivocally instruct that Congress intended that the entire state (or territorial) workers' remedial scheme operate concurrently with the federal compensation scheme in the twilight zone. In that zone, the availability of relief under local law is controlled exclusively by local law.

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[14] The Third Circuit's suggestion—in seeking to distinguish *Hahn*—that LHWCA permits a State to provide a tort remedy if it is incorporated in the State's compensation statute but not if it is a matter of state common-law, is equally unfounded. It would be entirely improper for Congress, or the federal courts, to draw a distinction between state statutory law and state common law. The States (and Territories) may properly charge their courts with evolving law instead of formulating policy by statute. As this Court has made clear, "the Fourteenth Amendment leaves the States free to distribute the powers of government as they will between their legislative and judicial branches . . . . It is not for this Court to deny a State the right, or even to question the desirability, of fitting its law to a concrete situation through the autority given . . . to its courts." *Hughes v. Superior Court*, 339 U.S. 460, 467 (1950) (internal quotes omitted).

By focusing on the nuances of how the Virgin Islands chose to exercise its jurisdictional authority over injuries occurring within its territorial boundaries (including the twilight zone), rather than on the existence of that authority, the Third Circuit departed from *Sun Ship* and *Hahn*, and ruled contrary to congressional intent. The court's decision is invasive of the legitimate power and authority of the States and Territories. At a minimum, this case evidences a need for guidance regarding the preemptive scope of LHWCA in the twilight zone and the meaning of this Court's ruling in *Sun Ship*.

II. THE THIRD CIRCUIT'S DECISION CONFLICTS IN PRINCIPLE WITH THE CONCLUSION OF THE LOUISIANA SUPREME COURT THAT LHWCA DOES NOT PREEMPT STATE TORT CLAIMS AGAINST CO-EMPLOYEES BROUGHT BY MARITIME WORKERS INJURED IN THE TWILIGHT ZONE, AND IS INDICATIVE OF THE WIDESPREAD CONFUSION AMONG THE COURTS GENERALLY REGARDING THE PREEMPTIVE EFFECT OF LHWCA IN CASES IN THE TWILIGHT ZONE.

As the Third Circuit observed, the Louisiana Supreme Court addressed a question almost identical to that at issue here and reached a different conclusion. *See* 903 F.2d at 952 n.17; 34a. In *Poche v. Avondale Shipyards, Inc.*, 339 So.2d 1212 (La.), *appeal dismissed for want of jurisdiction*, 434 U.S. 803 (1977), the Louisiana Supreme Court held that the wife and children of a shipbuilder who died from land-based injuries could sue the decedent's co-workers and his employer's officers under Louisiana *tort* law, even though LHWCA compensation was available and 33 U.S.C. Sec. 933(i) explicitly bars such actions. The court recognized that the events occured in the twilight zone where concurrent federal and state jurisdiction prevails, and concluded that the State's tort remedy was therefore available. In the Louisiana Supreme Court's view, once it was determined that the case

fell within the twilight zone, it was not necessary to "re-examine the question of state-federal conflict with respect to particular provisions of the [two laws]." *Id.* at 1221. The court reasoned:

> "It is obvious that unless the state statute provides benefits or rights beyond those accorded by federal law, there would be no reason to elect to pursue the state remedy. To hold . . . that a plaintiff may elect state law but only insofar as the rights accorded thereunder do not exceed those provided in the federal scheme is to render meaningless the right to make the initial election. We find it particularly significant that workers who chose to pursue state remedies during the pre-1972 era were allowed to take advantage of the state law in its entirety. . . . In sum, it is our opinion that the 1972 amendments to the LH[W]CA were intended to provide additional benefits for land-based maritime workers rather than to deprive them of rights and remedies which they already had." *Id.*

This same reasoning would undoubtedly lead the Louisiana Supreme Court to conclude that Section 905(a) of LHWCA does not preempt state negligence actions by twilight zone maritime workers against their employers.[15]

The Supreme Courts of Alabama and South Carolina, on the other hand, have ruled that the exclusivity provisions of Section 933(i) preempt a land-based maritime worker's negligence action for damages against his co-

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[15] The Third Circuit suggested that the Louisiana Court of Appeals has reached a different conclusion. *See* 903 F.2d at 952 n.17; 34a (citing *Sider v. Robin Temporary Service*, 515 So.2d 1123 (La. Ct.App. 1987), *cert. denied*, 519 So.2d 146 (La. 1988)). *Sider*, however, involved the preemptive effect of Section 905(b) of LHWCA and did not otherwise discuss or indicate whether it was a twilight zone case. The Louisiana Supreme Court has repeatedly reaffirmed *Poche*, specifically in light of this Court's *Sun Ship* decision. *See Logan v. Louisiana Dock Co.*, 541 So.2d 182, 188 (La.), *cert. dismissed*, 110 S.Ct. 30 (1989); *Thompson v. Teledyne Movible Offshore Inc.*, 419 So.2d 822, 826-827 (La. 1982), *appeal dismissed*, 464 U.S. 802 (1983).

employee. *See Fillinger v. Foster*, 448 So.2d 321, 326 (Ala.) (holding that "the concurrent jurisdiction for pursuit of benefits under a state's workmen's compensation scheme does not include common law suits for damages against co-employees"), *cert. denied*, 469 U.S. 872 (1984); *Smalls v. Blackmon*, 269 S.C. 614, 239 S.E.2d 640 (1977) (same). Apparently these courts share the same view of LHWCA preemption as the Third Circuit holds.

This direct conflict between state Supreme Courts is indicative of the widespread confusion among the courts regarding the preemptive effect of LHWCA in cases in the twilight zone. For example, in *Garvin v. Alumax of South Carolina, Inc.*, 787 F.2d 910 (4th Cir.), *cert. denied*, 479 U.S. 914 (1986), the Fourth Circuit held that even though LHWCA offers no "statutory employer" immunity, a worker injured in the twilight zone who filed a tort suit under state law against a third party was nonetheless subject to the state-recognized statutory employer defense. In contrast to the Third Circuit's decision in this case, the Fourth Circuit correctly concluded that:

> "Congress has not purported to prescribe the immunity rules to be applied by states in actions brought upon state law claims. The federal immunity rule is to be applied when the . . . claim is a federal claim; when the . . . claim is a state law claim, the immunity rules of that state are to be applied."

Id. at 917-918. The Fourth Circuit, informed by this Court's decision in *Sun Ship*, concluded that in the twilight zone, the availability of relief under local law is controlled by local law, not by LHWCA. This reasoning, which was shared by the Louisiana Court of Appeals in reaching the same conclusion in *Lewis v. Modular Quarters*, 508 So.2d 975 (La.Ct.App.), *cert. denied*, 514 So.2d 127 (La. 1987), *cert. denied*, 487 U.S. 1226 (1988) (White, J., and Blackmun, J., dissenting), conflicts in principle with the Third Circuit's decision below.

The Fifth Circuit, on the other hand, has reached a conclusion in direct conflict with that of the Fourth Circuit and the Louisiana state courts. *See Lewis v. Modular Quarters*, 487 U.S. 1226 (1988) (White, J., dissenting from denial of certiorari and noting conflict).[16] In *Martin v. Ingalls Shipbuilding*, 746 F.2d 231 (5th Cir. 1984) (*per curiam*), an employee of a subcontractor injured in the twilight zone brought a state law negligence action against the contractor. The district court applied Mississippi law and dismissed the action because, under state law, the contractor was entitled to "statutory employer" immunity from such actions. 746 F.2d at 232. The Fifth Circuit reversed, concluding that a claim could be pursued under LHWCA and that Section 905(a) of the Act provided no immunity from suit; therefore, in the court's view, the contractor was not immune from the negligence action. *Id.* Although the worker's suit was brought under state law, the Fifth Circuit held that defenses were controlled by federal law. *See also Gates v. Shell Oil*, 812 F.2d 1509 (5th Cir. 1987).

As these cases illustrate, the presence of concurrent federal and state jurisdiction in the twilight zone of maritime injuries has created marked confusion among the Circuits and the highest courts of States regarding the effect of LHWCA on state law tort actions. At one end of the spectrum are courts such as the Louisiana Supreme Court, which hold that the state scheme and LHWCA operate in entirely separate fields and there is no preemption. At the other end of the spectrum are courts such as the Fifth Circuit, which apparently believe that LHWCA always overrides state law.[17] The Third Circuit

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[16] Because of the conflict between the Louisiana courts and the Fifth Circuit, a litigant who appears in state court will obtain the exact opposite treatment, on a matter of federal law, from that which the litigant would have received had he appeared in federal court.

[17] The very different views of the Louisiana Supreme Court and the Fifth Circuit concerning the preemptive effect of LHWCA

adopted this latter approach. This case presents an ideal opportunity for the Court to provide desperately needed guidance to both federal and state courts regarding the preemptive effect of LHWCA in the large number of cases falling within the twilight zone. In resolving the preemptive effect of Section 905(a) on state tort actions against employers for injuries occurring in the twilight zone, the Court will establish the legal framework for analyzing all other LHWCA preemption issues arising in this zone of concurrent state and federal jurisdiction.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted,

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November 15, 1990

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make it likely that "twilight zone" state tort actions will not be preempted if filed in state courts in Louisiana, but will be preempted if filed in federal district courts in Louisiana. The litigant's choice of forum would thus be determinative on an issue of federal law.

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 88-3797 and 88-3798

CONRAD PETER,
Appellant in No. 88-3797

vs.

HESS OIL VIRGIN ISLANDS CORP.,
Appellant in No. 88-3798

Appeal from the District
Court of the Virgin Islands
(Division of St. Croix)
(Civil Action No. 86-0221)

Argued September 26, 1989

BEFORE: HIGGINBOTHAM, STAPLETON, and
SCIRICA, *Circuit Judges*

(Opinion Filed May 17, 1990)

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OPINION OF THE COURT

STAPLETON, *Circuit Judge*:

I.

This is a negligence action brought by Conrad Peter against Hess Oil Virgin Islands Corporation ("Hess") under Virgin Islands law. Peter alleged that Hess did not take the safety measures necessary to protect him from exposure to jet fuel while working with fuel hoses at Hess' St. Croix refinery in 1984 and 1985, and that as a result of this exposure he suffered permanent lung injuries. A jury agreed and assessed his damages at $1.5 million. His recovery was reduced by $300,000, however, because of contributory negligence. These cross-appeals ensued. Jurisdiction below was based on 48 U.S.C. § 1612 and 4 V.I.C. § 32. We have jurisdiction over appeals from final decisions of the District Court of the Virgin Islands pursuant to 28 U.S.C. § 1291 and § 1294(3).

Several issues are presented on appeal. However, we address ourselves solely to Hess' contention that the judgment below must be reversed because allowing Peter a tort recovery against Hess under Virgin Islands law conflicts with the Longshore and Harbor Workers' Compensation Act ("LHWCA"). 33 U.S.C. § 901 *et seq.* Because we find that the common law negligence action Peter is pursuing obstructs the congressional policies advanced by LHWCA, we reverse.

II.

Hess argues that the Virgins Islands may not afford Peter a negligence action against Hess, his "borrowing employer", since § 905(a) of LHWCA purports to make the remedies available under LHWCA the exclusive source of relief for an injured longshoreman against his employer.[1] Our review of this question of law is plenary. This argument depends heavily on the answers to certain predicate questions. First, where was Peter working when he was exposed to jet fuel? Second, do his injuries fall within the scope of LHWCA? Third, does LHWCA recognize the borrowed servant doctrine? Fourth, was Peter Hess' borrowed servant? We address these questions *seriatim.*

A.

At Hess, Peter tied ships up to the dock, swept the dock, ran errands, and performed other maintenance

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[1] For purposes of our analysis, the Virgin Islands stands in no different position than would a state. The legislature of the Virgin Islands may not enact legislation inconsistent with the laws of the United States made applicable to the Virgin Islands. 48 U.S.C. § 1574(a). Therefore, only recently we have held that a Virgin Islands attorneys' fees statute could not be applied in a case cognizable in admiralty, because of its inconsistency with admiralty law principles. *Sosebee v. Rath,* 893 F.2d 54 (3d Cir. 1989), LHWCA applies to the Virgin Islands because the Act includes within the definition of navigable waters of the United States those of United States territories. 33 U.S.C. § 902(8).

chores. He also performed two tasks which required him to work with fuel hoses. The jury found that Peter suffered permanent lung injuries as a result of exposure to kerosene-based jet fuel while working with fuel hoses at Hess' refinery. These hoses were used to pump fuel aboard ships docked at Hess' refinery, and were permanently connected at one end to equipment based on Hess' pier. During this work Peter was not equipped with a face shield or other respiratory protection.

One of Peter's jobs was to connect and disconnect these hoses to ships. He would stand on the deck of the ship and a hose would be lowered to him by a crane on the dock. To attach the hose to the ship. Peter removed the bolts from flanges which sealed the line and then secured the hose to the ship's manifold. Before the unsealed hose could be connected to the ship Peter was often sprayed with jet fuel, causing him to inhale fumes from and ingest the jet fuel.

Hess does not dispute there is evidence that Peter was exposed to jet fuel while connecting hoses to ships docked at Hess. What it disputes is whether Peter was also so exposed while performing a second task, the "hose around", on the adjacent dock. This procedure involved connecting two fuel lines to ensure they were clean before use in loading or unloading fuel from a ship. The hoses were lifted by a crane down to the dock where Peter would remove flanges from the lines so they could be connected and flushed out. Peter's co-worker Morton indicated that Peter was splashed and sprayed with jet fuel during the hose around because of releases occurring when gaskets blew, bolts were removed, line blockages gave way, or the crane operator tilted the hoses at too great an angle. Morton testified that Peter actually swallowed fuel during this process.

The district court, in the course of ruling on a motion to dismiss filed before and determined after trial, indicated that Peter's "most substantial exposure to the of-

fending fuel was when he was on land on the dock engaged in disconnecting hoses" and thus "to a large extent his injuries were land-based." App. at 219. The trial record does not support this conclusion, since we find no rational basis in the record to determine which activity resulted in greater exposure. However, we do find evidence which supports a finding that Peter suffered substantial exposure to jet fuel both during the hose around and while working with fuel hoses aboard ships.[2]

B.

We answer the second question by agreeing with Hess that Peter's injuries fall within the scope of LHWCA, a federal workmen's compensation statute which provides compensation to certain employees for:

> disability or death . . . if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading or unloading, repairing, or building a vessel)....

33 U.S.C. § 903. Under LHWCA, an employee "means any person engaged in maritime employment, including

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[2] Hess makes much of Peter's medical expert's testimony that Peter's injuries were caused by his exposure to jet fuel while connecting and disconnecting hoses to and from ships. Since the medical expert did not testify that Peter's injuries were caused by exposures during the "hose around", Peter's injuries supposedly were all caused on ships. This argument is unpersuasive. The expert was testifying about the medical causes of Peter's condition. He identified the cause as exposure to jet fuel. This is the import of the testimony. That the doctor said that Peter's injuries were caused by exposure to jet fuel while connecting hoses to ships does not eradicate the effect of Morton's testimony that Peter swallowed jet fuel during the hose around. We decline to read the doctor's testimony as indicating that jet fuel swallowed on the deck of a ship is somehow more harmful than identical jet fuel swallowed on a dock.

any longshoreman or other person engaged in longshoring operations . . . ." 33 U.S.C. § 902(3). To be covered by LHWCA an employee must have been injured on a "situs" included in § 903's definition of navigable waters and a satisfy a "status" test. *Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 416 (1985).[3] Since Peter was exposed to jet fuel on a ship and on a pier adjacent to the navigable waters, he satisfies the situs requirement.[4] As both the hose around and connecting of fuel hoses were tasks necessary to the loading of vessels. Peter also satisfies the "status" requirement. *Chesapeake and Ohio Railway Co. v. Schwalb*, 110 S.Ct. 381 (1989); *P.C. Pfeifer v. Ford*, 444 U.S. 69, 80 (1979); *Northeast Marine Terminal Co. Inc. v. Caputo*, 432 U.S. 249 (1977).

C.

The third and fourth questions we have posed require us to determine: (a) whether LHWCA is properly construed in accordance with the borrowed servant doctrine, and, if so, (b) whether Peter was Hess' borrowed employee at the time he worked at its refinery. If the answer to these questions is yes, this has important consequences for our analysis since LHWCA has contained, from its inception, a provision specifying that LHWCA benefits are the exclusive remedy against an employer who is responsible for them:

> The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee . . . except that if an employer fails to secure payment of compensation as required by this chapter, an injured

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[3] The employee must also be employed by an "employer" defined as "an employer any of whose employees are employed, in whole or in part, upon the navigable waters of the United States" as defined by 33 U.S.C. § 903. 33 U.S.C. § 902(4).

[4] LHWCA covered injuries include occupational disease arising from maritime employment. 33 U.S.C. § 902(2).

> employee . . . may elect to claim compensation under the chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death. . . .

33 U.S.C. § 905(a).[5] Hess contends that as Peter's borrowing employer, it is entitled to the immunity afforded by this provision, an immunity it believes bars the tort action Peter is pursuing against it.

The borrowed servant doctrine has commonly been applied in the context of workmen's compensation statutes to hold borrowing employers liable for compensation for injuries suffered by their borrowed employees. *See generally* 1C A. Larson, Workmen's Compensation Law § 48 (1989) ("Larson") (discussing doctrine and citing cases). Concomitantly, it has been applied to afford the borrowing employer with the immunity provided by workmen's compensation statutes that, as a general rule, make their statutory benefits the exclusive remedy against the employer of the injured party. *Id.* We have recently described this use of the doctrine:

> Under the borrowed employee doctrine, if a special (borrowing) employer exercises a sufficient degree of control over a borrowed employee for a time sufficient to suggest that the employee has assessed the risks of his new employment and has acquiesced in his borrowing employer's control, the borrowing employer may be deemed a statutory employer for purposes of workers' compensation. *See generally* 1C A. Larson, *Workmen's Compensation Law* § 48.10 (1982). The borrowed employee is then barred from suing his borrowing employer for injuries sustained during the course of his employment; instead, the borrowed employee is remitted to the exclusive rem-

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[5] Prior to 1972, this provision was codified as 33 U.S.C. § 905. When we speak of § 905 or 905(a) we are referring to the substance of what is set forth above.

> edy provided by the relevant workers' compensation act.

Vanterpool v. Hess Oil V.I. Corp., 766 F.2d 117, 121 (3d Cir. 1985).

In *Vanterpool*, we found the borrowed servant doctrine applied within the statutory scheme of the Virgin Islands Workmen's Compensation Act, 24 V.I.C. § 251 *et seq.*, as it existed at the time plaintiff Vanterpool was injured. Therefore, we held that the doctrine barred Vanterpool, an employee loaned from Litwin to Hess, from maintaining a tort action against Hess under Virgin Islands law to recover damages for an injury suffered at its refinery.

On October 19, 1984, a month before Peter came to work at Hess' refinery, the legislature amended the Islands' compensation act to add a section abrogating the borrowed employee doctrine:

> It shall not be a defense to any action brought by or on behalf of an employee, that the employee at the time of his injury or death was the borrowed, loaned or rented employee of another employer. Any oral or written agreement between an employer and employee which makes the employee the borrowed, loaned or rented employee of another employer shall be null and void as being against the public policy of this Territory.

24 V.I.C. § 263a; *see also* 24 V.I.C. § 284(b). Since the Virgin Islands legislature has no legislative authority with respect to federal law, this statute abrogated the borrowed servant doctrine for purposes of the Virgin Islands workmen's compensation statute but had no effect upon LHWCA.

Although this court has never faced the question of whether the borrowed servant doctrine is properly applied to LHWCA, two sister courts of appeals have held

that that doctrine is a valid way to determine whether a particular business entity is liable for a worker's LHWCA compensation and therefore eligible for protection under § 905(a). The Fifth Circuit first applied the borrowed servant doctrine for purposes of determining whether the defendant was shielded by the exclusivity provision of § 905(a) of LHWCA in *Ruiz v. Shell Oil Company*, 413 F.2d 310 (5th Cir. 1969). In *Huff v. Marine Testing Corp.*, 631 F.2d 1140 (4th Cir. 1980) (the Fourth Circuit also applied the doctrine to LHWCA.

The Benefits Review Board, the adjudicative agency for claims arising under the Act, has also applied the borrowed servant doctrine in determining who is an employer under the Act. *Edwards v. Williamette Western Corporation*, 13 BRBS 800 (1981) (approving use of the Fifth Circuit and Larson tests of borrowed employee status for use under LHWCA and indicating there can be two employers jointly liable for LHWCA compensation); *see also Symanowicz v. Army & Airforce Exchange Service*, 672 F.2d 638 (7th Cir.) (reviewing and affirming a Benefits Review Board case where the Board applied *Gaudet* test to determine whether claimant was employed by an entity he claimed was responsible for securing his benefits), *cert. denied*, 459 U.S. 1016 (1982).

We agree with the Fourth and Fifth Circuits and with the Benefits Review Board that the concept of an employer as used in LHWCA includes firms considered borrowing employers under the borrowed servant doctrine. Workmen's compensation statutes have commonly been construed to make borrowing employers liable for the compensation of their borrowed servants, and thus borrowing employers have been considered "employers" for purposes of immunity from tort liability. See 1C Larson, *supra*, § 48. LHWCA follows the traditional pattern of workmen's compensation statutes, and we are confident that LHWCA was intended by Congress to be construed in accordance with the borrowed servant doctrine. Thus,

we believe that if Peter is Hess' borrowed employee, he is Hess' employee for purposes of LHWCA.

In reaching this conclusion we have not overlooked the 1984 amendments of LHWCA, which Peter contends foreclose application of the borrowed servant doctrine. Congress passed these amendments in response to the case of *Washington Metropolitan Transit Authority v. Johnson*, 467 U.S. 925 (1984). In *Washington Metro*, the Supreme Court held that a contractor who purchased LHWCA coverage for the employees of its subcontractors could be considered the "employer" of those employees for purposes of the exclusivity provision of § 905(a) of LHWCA, despite the fact that the contractor had not been statutorily required to procure this coverage. The contractor was not a borrowing employer and no borrowed servant doctrine issue was raised.

Congress moved swiftly to statutorily overrule *Washington Metro*. Section § 904(a) was amended to provide that a "subcontractor shall not be deemed to have failed to secure the payment of compensation if the contractor has provided insurance for such compensation for the benefit of the subcontractor." 33 U.S.C. § 904(a). Section 905(a) was amended to make clear that a "contractor shall be deemed the employer of a subcontractor's employees if the subcontractor fails to secure the payment of compensation as required by section [904]." 33 U.S.C. § 905(a).

In *West v. Kerr-McGee Corp.*, 765 F.2d 526 (5th Cir. 1985), the Court of Appeals for the Fifth Circuit held that the 1984 post-*Washington Metro* amendments did not preclude use of the borrowed employer doctrine under LHWCA. The court acknowledged that the "bare language of the amendment to § 905(a) could . . . be interpreted as foreclosing any designation of any contractor as the employer of its subcontractors' employees—even if a borrowed employee relationship existed—unless the sub-

contractor failed to secure compensation payments." 765 F.2d at 529. However, it noted that another possible reading was "that the 'shall be deemed' language of the § 905 (a) amendment refers only to 'deeming' a contractor the employer of a subcontractor's employee when the contractor is not the employee's true employer as well," that is, when the employer was not the employee's borrowing employer. *Id.* at 530.

Since these contrary readings evidenced "latent ambiguities" in the statute, the court looked to the legislative history of the 1984 amendment. Finding that the only purpose of Congress was to overrule *Washington Metro*, and that there was no intent to overturn the borrowed servant cases decided under LHWCA, the *West* court held that the borrowed servant, immunity defense was still available under LHWCA. *Id.* at 530. The Fifth Circuit has continued to adhere to *West*. *See, e.g., Melancon v. Amoco Production Co.*, 834 F.2d 1238 (5th Cir. 1988); *Alexander v. Chevron, U.S.A.*, 806 F.2d 526 (5th Cir. 1986), *cert. denied*, 483 U.S. 1005 (1987); *Capps v. N.L. Baroid-NL Industries, Inc.*, 784 F.2d 615 (5th Cir. 1986), *cert. denied*, 479 U.S. 838 (1986); *Doucet v. Gulf Oil Corp.*, 783 F.2d 518 (5th Cir. 1986), *cert. denied*, 479 U.S. 883 (1986); *see also* 1A E. Jhirad, *Benedict on Admiralty*, § 34, 2-73 (1989) (suggesting that the borrowed servant doctrine is still viable under LHWCA).

West's reading of legislative history is correct: there is nothing in the legislative history indicating that Congress intended to do anything other than overrule *Washington Metro*. H.R. Conf. Rep. No. 98-1027, 98th Cong., 2d Sess. 24, *reprinted in* 1984 U.S. Code Cong. & Admin. News 2734, 2774. That brief history does not support the proposition that Congress wished to upset the use of the borrowed servant doctrine as utilized by the Fourth and Fifth Circuit cases; this is an omission of some significance in light of the care taken in the legislative history to identify cases that Congress did intend to overturn.

H.R. Rep. No. 98-570, 98th Cong., 2d Sess. 7, *reprinted in* 1984 U.S.Code Cong. & Admin. News 2740 (indicating rejection of *McDermott v. Boudreaux*, 679 F.2d 132 (5th Cir. 1982)); 130 Cong. Rec. H2488 (daily ed. April 9, 1984) (Explanation of House Amendment to S. 38, The Longshoremen's and Harbor Workers Act Amendments of 1983) (indicating intent to overrule *Melson v. United Brands Corporation*, 594 F.2d 1068 (5th Cir. 1979)).

It is the language of the amendments that provides the strongest support for the argument that the borrowed servant doctrine is no longer viable under LHWCA. However, while this language clearly denies immunity to contractors except in circumstances where the contractor has been forced to fulfill its role as a back-up provider of compensation for the subcontractor's employees, it does not provide a viable alternative to, nor does it clearly render inappropriate, use of the borrowed servant test to address a central question under the Act: who is the claimant's employer for purposes of the Act? [6] The borrowed servant test provides a way to answer the question that accords with the reality of the claimant's employment circumstances; a way that we believe the Congress would not have eliminated without indicating what should take its place. When this test indicates that an entity other than the one that putatively employs the claimant is really the claimant's employer, that borrow-

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[6] Thus, Professor Larson indicates that "[t]heoretically, the process of determining whether the [borrowing] employer is liable for compensation consists simply of applying the basic tests of employment . . . ." 1C A. Larson, Workmen's Compensation Law § 48.13 at 8-414 (1989); *see Oilfield Safety and Machine Specialities Inc. v. Harman*, 625 F.2d 1248, 1253-1257 (5th Cir. 1980) (noting similarity between Fifth Circuit borrowed servant test and the common-law test used under LHWCA). On the other hand, secondary liability for contractors under workers' compensation laws turns not on the employee's consent to work for the borrower, but on the relationship between the borrower and the employee's subcontractor-employer, and is designed to give contractors an incentive to use insured subcontractors. 2A Larson, *supra*, § 72.31(c), (b).

ing employer has been found to be the claimant's employer under the Act and has been held to be both subject to the burdens and entitled to the benefits that come with such status. We find that this continues to be the appropriate approach under LHWCA. Hence, if Hess is Peter's borrowing employer, then it is entitled to whatever immunity is available under § 905(a) of the Act.

The district court made no determination of whether Peter was Hess' borrowed servant since it concluded that Peter could recover in tort against Hess under Virgin Islands law regardless of whether Hess was Peter's employer under LHWCA. However, the trial record before us on this issue is substantial, and we believe that no reasonable trier of fact could conclude from that record that Peter was not Hess' borrowed servant. The Fifth Circuit, starting with *Ruiz*, has focused on nine relevant factors to determine whether a worker is a borrowed employee.[7] But in *Gaudet v. Exxon Corp.*, 562 F.2d 351 (5th Cir. 1977), *cert. denied*, 436 U.S. 913 (1978), the court considered only two of these factors to be essential in the workmen's compensation context: (1) whether the borrowing employer was responsible for the borrowing employee's working conditions and (2) whether the employment was of such duration that the borrowed employee could be presumed to have acquiesced in the risks of his new employment. 562 F.2d at 357. In *Vanterpool* we placed heavy emphasis on these factors as well, and indicated that the borrowed servant doctrine is "neither

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[7] These factors are: (1) Who has control over the employee and his work? (2) Whose work is being performed? (3) Was there an agreement between the original and borrowing employer? (4) Did the employee acquiesce in the new work situation? (5) Did the original employer terminate his relationship with the employee? (6) Who furnished the tools and place for performance? (7) Was the new employment over a considerable length of time? (8) Who has the right to discharge the employee? (9) Who had the obligation to pay the employee? *West v. Kerr-McGee Corp.*, 765 F.2d at 530.

unfair nor unreasonable [as a bar to tort recovery] when it is remembered that compensation liability cannot exist in the absence of some express or implied contract of hire between the borrowed employee and the borrowing employer." 766 F.2d at 122.

In this case, Peter explicitly agreed to work under conditions controlled solely by Hess. While Peter was directly employed by the Litwin Panamerican Corporation ("Litwin"), Litwin and Hess had a contractual arrangement whereby Litwin agreed to provide personnel for general maintenance and turnaround work at Hess' refinery. Defendant's Exhibit Y, App. 1077-1095.[8] This agreement divided loaned employees into two categories. The Type I category was comprised of employees who were furnished to work under Hess' exclusive direction and control and for whose workmanship Litwin was not responsible to Hess. App. at 1077. Type II loanees, by contrast, were to be supervised and directed by Litwin. *Id.* Litwin was contractually bound to pay the salaries of and procure workmen's compensation insurance for the Type I and II loanees. App. at 1084-85.

Peter came to work as a Type I loanee at Hess' St. Croix refinery on November 19, 1984. At that time he executed a Litwin document acknowledging that he was aware: (1) his work would be controlled, directed and supervised by Hess; (2) he should not receive direction from anyone except Hess or a Hess loanee supervisor; and (3) that Hess would provide him with safety equipment and a safe working environment. App. at 1076. Peter worked at the Hess refinery until August 22, 1985, under conditions of control consistent with this contractual arrangement, and was injured while performing the work of Hess. He clearly acquiesced in working for Hess

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[8] For a full discussion of this agreement, see this court's opinion in *Vanterpool v. Hess Oil*, 766 F.2d 117 (3d Cir. 1985), *cert. denied*, 474 U.S. 1059 (1986).

and Hess, via Litwin, was the provider of his salary and LHWCA coverage.[9]

We find no evidence in the record that could reasonably lead us to deviate from the opinions we expressed in *Vanterpool* that: "any assigned Type-I employee would necessarily work under the direct supervision and control of [Hess]," that Litwin acts essentially as an employment broker with respect to Type I employees, and that "it is difficult to conceive how a Type I employee, who obtained employment through Litwin could be deemed to do anything other than consent to work for [Hess]." *Id.* at 120, 127; *see also Nieves v. Hess Oil Virgin Islands Corp.*, 819 F.2d 1237 (3d Cir. 1978) (following *Vanterpool* and holding summary judgment appropriately granted to Hess on defense that Type I loanees were borrowed servants). We therefore find that Hess is Peter's employer for purposes of LHWCA.

III.

Having determined this, a literal reading of § 905(a) would indicate that this is a simple case and Peter is entitled only to the remedies available under LHWCA. We are not free, however, to give the usual weight to the statutory text here. LHWCA is a statute which can be understood only in light of its considerable history, and, as we shall see in the ensuing review of that history, this section of LHWCA has not been construed to bar all state remedies against the employer.

A.

To resolve this case we must consider a line of Supreme Court admiralty and LHWCA cases beginning with *Southern Pacific Co. v. Jensen*, 244 U.S. 205

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[9] Indeed, Peter's negligence theory is based on Hess' alleged breach of its duty to provide him with safe work conditions and adequate safety equipment.

(1917). *Jensen* held that the State of New York could not constitutionally provide a workmen's compensation remedy to the survivors of a worker killed on the gangway between a ship and shore while unloading lumber from the ship. As the decedent was working as a stevedore over navigable waters at the time he was killed, the Court indicated his claim fell "clearly within the admiralty jurisdiction." *Id.* at 217. The Court stated that there are limits to the extent a state could affect the general maritime law, and that state law violates Articles III, § 2 [10] and I, § 8 [11] of the Constitution "if it contravenes the essential purpose expressed by an act of Congress or works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony and uniformity of that law in its international and interstate relations." *Id.* at 216.

The Court held that the New York statute undermined the uniformity of the maritime law, reasoning that if New York were permitted to apply its law, then every other state would be permitted to impose similar obligations on maritime employers within their jurisdictions, subjecting them to a myriad of burdensome regulations. *Id.* at 217-18. Moreover, the award could not be sustained as a common law remedy saved to the longshoreman by the savings to suitors clause, then 28 U.S.C. § 1333(a)(1),[12] because the no-fault administrative rem-

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[10] Article III, § 2 of the Constitution extends the federal power to "all Cases of admiralty and maritime Jurisdiction."

[11] Article I, § 8 gives Congress the power "[t]o make all laws which may be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this Constitution in the government of the United States or in any department or officer thereof."

[12] This provision then provided that the district courts of the United States had original jurisdiction of admiralty cases to the exclusion of the state courts, saving to suitors "the right of a common law remedy where the common law is competent to give it." This section, now 28 U.S.C. § 1331(1), now saves to suitors "all other remedies to which they are otherwise entitled."

edy provided by New York's compensation statute was unknown at common law and no court was competent to award such relief. *Id.* at 218.

After *Jensen*, however, the Supreme Court made clear that its concern for the uniformity of the maritime law abruptly ended at the water's edge. Because of the Supreme Court's reliance on the locality of the tort as determining, in the first instance, whether a state could apply its workmen's compensation scheme to an injury suffered by a longshoreman, it never inquired into the impact upon maritime commerce or the uniformity of the maritime law caused by state statutes requiring employers of workers who regularly traversed the shore line to obtain insurance under the state statute.

For example, in *Industrial Comm. v. Nordenholt Co.*, 259 U.S. 263 (1922), a longshoreman had been killed on a dock while unloading a vessel lying in navigable waters. The state courts reversed a state compensation award to the decedent's survivors, relying on *Jensen*. The Supreme Court held that *Jensen* did not preclude the state award:

> When an employee, working on board a vessel in navigable waters, sustains personal injuries there, and seeks damages from the employer, the applicable legal principles are very different from those which would control if he had been injured on land while unloading the vessel. In the former situation the liability of the employer must be determined under the maritime law; in the latter, no general maritime law prescribes the liability, and the local law has always been applied. The liability of the employer for damages on account of injuries received on shipboard by an employee under a maritime contract is matter within the admiralty jurisdiction; but not so when the accident occurs on land.

Id. at 271-72. Thus, no matter how directly related a longshoreman's tasks were to maritime commerce, and

no matter how burdensome the state insurance scheme was to his employer, a state could require that maritime employer to pay a compensation award for an injury suffered on land. *Nordenholt* and a consistent line of subsequent cases establish that the *Jensen* doctrine would not foreclose the Virgin Islands from providing a workman's compensation remedy for the injury Peter suffered while performing the hose around task on the dock.

It was in the case of injuries occurring over the navigable waters that the court undertook an inquiry into the burden a state compensation statute would have on the uniformity of the maritime law and maritime commerce. Not every worker injured on the navigable waters was precluded from a state workmen's compensation recovery. Instead, "[i]f the employment of an injured worker was determined to have no 'direct relation' to the navigation or commerce, and the 'application of local law [would] not materially affect' the uniformity of maritime law, then the employment would be characterized as 'maritime but local,' and the State could provide a compensation remedy." *Director, OWCP v. Perini North River Assoc.*, 459 U.S. 297, 306 (1983) (quoting *Grant Smith-Porter Ship Co. v. Rohde*, 257 U.S. 469, 477 (1922)).

The "maritime but local" exception to *Jensen* became infamous several years after Congress enacted LHWCA in 1927. As enacted, LHWCA was a "gap-filler". *Caputo*, 432 U.S. at 257, providing compensation to workers, excluding certain employees such as the crews of vessels, for injuries occurring upon the traditional navigable waters of the United States only "if recovery . . . through workmen's compensation proceedings may not be validly provided by State law." 44 Stat. (part 2) 1424 at 1426, *quoted in Perini*, 459 U.S. at 307. This language was initially interpreted as excluding from LHWCA coverage employees falling within the "mari-

time but local" exception. G. Gilmore & B. Black, The Law of Admiralty 419-420 (2d ed. 1975).

This interpretation led to a great deal of uncertainty among the courts and injured longshoremen as to the proper forum to file compensation claims based on injuries suffered over the water. As a result of this confusion, many injured longshoremen were effectively denied recovery, since if a worker chose a state compensation remedy and was found not to fall within the "maritime but local" exception he was often left without a remedy because he would be time-barred under LHWCA. Similarly, if a worker claimed under LHWCA and was found to fall within the "maritime but local" exception, he had no LHWCA remedy and might be time-barred at state law. This game was particularly treacherous for injured longshoremen because judicial determinations as to what was "maritime but local" were often fundamentally inconsistent with one another. *See Calbeck v. Travelers Insurance Co.*, 370 U.S. 114, 119 (1962) ("No dependable definition of the area—described as 'maritime but local', or 'of local concern'—where state laws could apply ever emerged from the many cases which dealt with the matter in this and the lower courts. The surest that could be said was that any particular injury might be within the area of 'local concern,' depending upon its peculiar facts.").

The Supreme Court recognized the unfairness inherent in this state of affairs in *Davis v. Department of Labor*, 317 U.S. 249 (1942). The court in *Davis* sustained a state compensation award to the widow of a steel worker. The steel worker had drowned in navigable waters after falling off a barge while helping to load the barge with pieces of steel from a drawbridge that was being dismantled. The Washington statute at issue allowed compensation for employees if it could be made within the permissible limits of the state's jurisdiction; the Washington Supreme Court had held that an award to the steel worker was constitutionally impermissible.

The Supreme Court reversed, not because the employment was of the maritime but local variety, but because of a new concept it articulated, the "twilight zone." The Court acknowledged that the uncertainty engendered by the maritime but local doctrine "defeat[ed] the purpose of the federal act, which seeks to give to these hard-working men, engaged in a somewhat hazardous employment, the justice involved in the modern principle of competition, and the state Acts such as the one before us, which aims at sure and certain relief for workmen." *Id.* at 254 (quotations omitted).

Realizing that courts had often divided on questions of line-drawing in this area and that the case law was incoherent, the Court indicated that it would effectively abandon any pretense of categorizing workers whose injuries could not be easily identified as either compensable or not compensable by state law under the maritime but local doctrine. These injured employees occupied "that shadowy area within which, at some undefined and undefinable point, state laws can validly provide compensation." *Id.* at 253. In this twilight zone of uncertainty, it was impossible for employees or employers to determine in advance whether sanctioning the state remedy in the particular situation involved would sufficiently "interfere with the proper harmony and uniformity of maritime law" as to be unconstitutional. *Id.* at 254. The Court then looked to commerce clause jurisprudence for a resolution to this dilemma:

> We find here a state statute which purports to cover these persons, and which indeed does cover them if the doubtful and difficult factual questions to which we have referred are decided on the side of the constitutional power of the state. The problem here is comparable to that in another field of constitutional law in which courts are called upon to determine whether particular state acts unduly burden interstate commerce. In making the factual judgment

> there, we have relied heavily on the presumption of constitutionality in favor of the state statute.

Id. at 257. Giving "full weight" to this presumption of constitutionality and resolving all doubts in favor of that presumption, the Court indicated that a finding of unconstitutionality could not be "rested on so hazardous a factual foundation" and reversed the judgment of the Oregon Supreme Court denying state compensation relief to the steel worker's widow. *Id.* at 258. As the Court noted many years later, by so holding the *Davis* court "effectively established a regime of concurrent jurisdiction" within the twilight zone. *Sun Ship, Inc. v. Pennsylvania*, 447 U.S. 715, 718 (1980).

In *Calbeck v. Travelers Ins. Co.*, 370 U.S. 114 (1962), the Supreme Court further reduced the chances that an injured worker would fall between the cracks of the shifting jurisdictional line created by the maritime but local doctrine. *Calbeck* held that LHWCA, as it then stood,

> emerge[d] from . . . a congressional desire for a statute which would provide federal compensation for all injuries to employees on navigable waters: in every case, that is, where *Jensen* might have seemed to preclude state compensation. The statute's framers adopted this scheme in the Act because they meant to assure the existence of a *compensation remedy* for every such injury, without leaving employees at the mercy of the uncertainty, expense, and delay of fighting out in litigation whether their particular cases fell within or without state acts under the "local concern" doctrine.

Id. at 120-22 (emphasis added). Finding this to be Congress' overriding purpose, the Court construed § 903 (a) of LHWCA, which then provided for compensation under LHWCA only for injuries occurring on the navigable waters "and if recovery . . . through workmen's

compensation proceedings may not validly be provided by State law," to mean that such compensation was available in any situation where the maritime but local cases "had rendered questionable the availability of a state compensation remedy." *Id.* at 126. Thus, there were circumstances in which, contrary to what the text of section 903(a) might have indicated, a worker could obtain a LHWCA award even though his injury was constitutionally compensable under state law. *Id.* at 126-27. Indeed, the Court held that it was permissible for a claimant to obtain a LHWCA award subsequent to a state law award, where the first award was credited against the LHWCA award to prevent a double recovery. *Id.* at 131.

In *Moores' Case*, 232 Mass. 162, 80 N.E.2d 478 (1948), the Supreme Judicial Court of Massachusetts applied *Davis* to a situation in which a worker had been injured while performing repair work upon a completed vessel in a dry dock upon navigable waters. Sustaining the state workmen's compensation award he received, the court commented:

> [O]ur proper course is . . . to regard the *Davis* case as intended to be a revolutionary decision deemed necessary to escape an intolerable situation and as designed to include within a wide circle of doubt all water front cases involving aspects pertaining both to the land and to the sea were a reasonable argument can be made either way, even though a careful examination of numerous previous decisions might disclose an apparent weight of authority one way or the other.

80 N.E.2d at 481. The Supreme Court of the United States affirmed the decision of the Massachusetts high court in a per curiam decision citing *Davis*. *Bethlehem Steel Co. v. Moore*, 335 U.S. 874 (1948). This affirmance is noteworthy because prior Supreme Court decisions had classified this type of work as falling outside of the mari-

time but local exception. *See Baizley Iron Works v. Span*, 281 U.S. 222 (1930); *Robins Dry Dock & Repair Co. v. Dahl*, 266 U.S. 449, 457 (1925). Thereafter, the Supreme Court reversed a California Supreme Court ruling overturning a state award to a shipyard worker injured while repairing a vessel. *Baskin v. Industrial Acc. Comm'n*, 338 U.S. 854 (1949). The Court remanded, suggesting that the California Supreme Court might wish to consider *Moore's Case*. After the California Supreme Court reversed its earlier determination and awarded compensation, the Supreme Court affirmed. *Kaiser Co. v. Baskin*, 340 U.S. 886 (1950).

Like the repair of a completed ship in navigable waters, the loading and unloading of a vessel was not a task falling within the maritime but local exception. *Employer's Liability Assur. Corp. v. Cook*, 281 U.S. 233, 236 (1930). Prior to *Davis*, a state compensation award to a worker injured while engaged in this task on the navigable waters would have been impermissible. But as the *Moore* and *Baskin* decisions indicate, *Davis* supplanted the rigid, and arbitrary, lines that previously existed with a presumption of constitutionality that resolved close cases in favor of injured workers.

In *Hahn v. Ross Island Sand & Gravel*, 358 U.S. 272 (1959), a per curiam decision, the Supreme Court advanced the *Davis* principle even further. *Hahn* involved a petitioner who had been injured while working on a barge in a lagoon opening into navigable waters. He brought suit under a section of the Oregon workmen's compensation statute against his employer, who had secured compensation for him under LHWCA. The Oregon Supreme Court dismissed the injured worker's case. The United States Supreme Court reversed, holding as follows:

> As to cases within this "twilight zone," *Davis*, in effect, gave an injured waterfront employee an election to recover compensation under either the Long-

> shoremen's Act of the Workmen's Compensation Law of the State in which the injury occurred. It seems plain enough that petitioner's injury occurred in the "twilight zone," and that recovery for it "through workmen's compensation proceedings," could have been, and in fact was, validly "provided by State law"—the Oregon Workmen's Compensation Act . . . . Therefore, the Longshoremen's Act did not bar petitioner's claim under state law. But since his employer had elected to reject them the automatic compensation provisions of the Oregon Workmen's Compensation Act did not apply to the claim. . . . [T]he law provides, however, that when an employer has elected to reject the Act's automatic compensation provisions his injured employee may maintain in the courts a negligence action for damages. Of course, the employee could not do this if the case were not within the "twilight zone," for then the Longshoremen's Act would provide the exclusive remedy. Since this case is within the "twilight zone," it follows from what we held in *Davis* that nothing in the Longshoremen's Act or the United States Constitution prevents recovery.

Id. at 273. *Hahn* thus makes clear that within the twilight zone, a state tort remedy does not violate the constitutional principle enunciated in *Jensen*, and also that in certain circumstances a state tort remedy was available to a worker covered by LHWCA.

Roughly contemporaneous with these decisions, the Supreme Court rendered decisions that reduced the importance of LHWCA in compensating the injuries of longshoremen. In *Seas Shipping Co. v. Sieracki*, 328 U.S. 85 (1946), the Court held that a shipowner's warranty of seaworthiness extended to a longshoremen injured while loading the vessel, because loading and unloading vessels was historically a task of the ship's crew and LHWCA was not intended to deprive longshoremen of their tradi-

tional remedies of the seas. Thus, an injured longshoreman could both obtain a no-fault LHWCA compensation award from his employer, and pursue a strict-liability unseaworthiness award against the vessel upon which he was injured.

In *Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp.*, 350 U.S. 124 (1956), the Court held that a shipowner who was forced to pay damages to a longshoreman injured by his employer's unsafe storage of cargo could recover indemnity from the longshoreman's employer. The Court agreed that § 905's "obvious purpose . . . is to make the statutory liability of an employer to contribute to its employee's compensation the exclusive liability of such employer to its employee, or to anyone claiming under or through such employee, on account of his injury or death arising out of that employment." *Id.* at 129. However, the Act reserved to employees the right to proceed against third parties like shipowners. *Id.* at 130. Section 905 protected stevedores from any liability flowing from its breach of a duty to its longshoreman-employee, but the Court found that such liability for indemnity could be "grounded upon the [employer's] breach of its purely consensual obligation *owing to the shipowner* to stow the cargo in a reasonably safe manner." *Id.* at 131-132 (emphasis in original). This serious diminution of the employer's protection from tort liability was further advanced in *Reed v. The Yaka*, 373 U.S. 410 (1963), in which the Supreme Court held that a longshoreman could sue his employer directly for unseaworthiness where his employer was the owner *pro hac vice* of the vessel whose unseaworthiness caused his harm.

"The net result [of this series of holdings] . . . was to make the stevedore absolutely liable for statutory compensation in all cases and to deny him protection from additional liability in the cases in which his negligence could be established." *Jones & Laughlin Steel v. Pfeifer*, 462 U.S. 523, 531 n. 7 (1983). That is, the

employee could have his workmen's compensation, and his tort damages too, all at the expense of his employer. When coupled with a level of LHWCA compensation that was inadequate, the availability of the unseaworthiness remedy led to a large amount of litigation, accompanied by crowded court dockets, the need to pay lawyers, and all the other social costs of lawsuits, without a real benefit to workers. See S. Rep. No. 92-1125, 92d Cong., 2d Sess., 3-5 (1972); H.R. Rep. No. 92-1441, 92d Cong., 2d Sess., 3-5 (1972).

Congress acted to remedy this stiuation in 1972. Maritime labor interests desired markedly higher LHWCA benefits. Maritime employers indicated they could provide higher benefits "only if the [LHWCA] were to again become the exclusive remedy against the stevedore as it had been intended since its passage in 1927 until modified by various Supreme Court decisions." *Id.* at 5. Congress obliged these concerns by substantially increasing the level of compensation available under LHWCA, eliminating the strict-liability unseaworthiness remedy and the right of the shipowner to obtain indemnity from the stevedore-employer, and substituting for the unseaworthiness action a maritime negligence claim that could be brought by a longshoreman against a vessel that caused him injury. *See* 33 U.S.C. § 905(b).[13] A central purpose of these changes was to minimize the need for litigation and to increase the importance and adequacy of statutory compensation as the principal method for remedying longshore injuries. *Rodriquez v. Compass Shipping Co.*, 451 U.S. 596, 616 (1981).

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[13] A longshoreman's employer can be sued in its capacity as a vessel under § 905(b) without running afoul of § 905(a). However, the employer may not be held liable for damages caused by its actions in its role as a stevedore, but only for damages caused by its actions in its capacity as a "vessel". *Jones & Laughlin Steel v. Pfeifer*, 462 U.S. 523 (1983).

Realizing that the increase in the level of LHWCA benefits would create a large disparity between the level of benefits ordinarily available to a longshoreman injured over the navigable waters and one injured on the adjacent pier and thus only covered by state acts. Congress also amended LHWCA to expand its coverage beyond the traditional navigable waters to specific adjoining areas, such as piers and other adjoining areas "customarily used by an employer in loading, unloading, dismantling, or building a vessel." *See* 33 U.S.C. § 903(a). Congress was aware that modern longshoring techniques involved an increased amount of work on land, and believed that the availability of compensation should not turn upon the "fortuitous circumstance of whether the injury occurred on land or over water." S. Rep. No. 92-1125 at 13; H.R. Rep. No. 92-1441 at 10-11. In essence, Congress sought to provide a seamless blanket of coverage for all longshore injuries. *Id.*

In 1980, the Supreme Court addressed the question of whether this landward extension of LHWCA's coverage displaced states from applying their own workmen's compensation schemes to land-based injuries which fell under this expanded federal coverage. *Sun Ship, Inc. v. Pennsylvania*, 447 U.S. 715 (1980). The Court unanimously answered that there was no inconsistency between the application of state workmen's compensation remedies in this situation and the federal compensation scheme as embodied in LHWCA, and held that a longshoreman injured on a land-based LHWCA situs could receive *both* an award under state compensation law and LHWCA, since the two awards were complementary rather than exclusive, and a prior award under state law would be credited against the LHWCA award. *Id.* at 725 & n. 8.

The Court found in *Sun Ship* that Congress had not, during the process of amending the Act in 1972, expressed any intent to alter the "accepted understanding

that federal jurisdiction would coexist with state compensation laws in that field in which the latter may constitutionally operate under the *Jensen* doctrine." *Id.* at 722; *see also* Gilmore & Black, *supra*, at 426. Rather, the landward shift merely extended the zone of concurrency recognized in *Davis* and *Calbeck* to encompass those land areas now covered by LHWCA as amended.[14]

The Court specifically rejected the argument that concurrent jurisdiction was inappropriate because "concurrent jurisdiction could result in more favorable awards for workers' injuries than under an exclusively federal compensation system." *Id.* at 724. The Court noted that a concern of the Congress was the paucity of state benefits and found no evidence that Congress was "concerned about a disparity between adequate federal benefits and *superior* state benefits." *Id.* (emphasis in original). "[T]he *quid pro quo* to the employers for the landward extension of the LHWCA by the 1972 amendments was simply abolition of the longshoremen's unseaworthiness remedy." *Id.* Nor was the Court persuaded that the fact that federal and state compensation systems were different "gives rise to a conflict that from the employer's point of view, necessitates exclusivity for each system within a separate sphere." *Id.* at 725. Given the uncertainties which still attended the question of whether a claim fell within or without LHWCA under the "status and situs" test, employers would be forced to comply with state laws even if LHWCA was exclusive within its realm since claims could easily fall outside its coverage. *Id.* at 725; *see also Herb's Welding, Inc. v. Gray*, 470 U.S. at 426 ("[T]here will always be a boundary to coverage, and there will always be people who cross it during their employment.").

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[14] The Court also noted that the Congress deleted the language of § 903(a) that, prior to *Calbeck*, had been thought to limit the availability of LHWCA compensation to those injuries not constitutionally compensable under state law. 447 U.S. at 720-721 & n.2.

Importantly, the Court found that the exclusive remedy provision of § 905(a) of LHWCA provided no obstacle to the provision of a concurrent state remedy. As this section predated *Davis* and *Calbeck*, the Court indicated that those decisions construed the section as not excluding remedies offered by other jurisdictions, and found that Congress did not, by its 1972 amendments, reject this interpretation. *Id.* at 722-23 n. 4.

Though *Sun Ship* itself dealt only with allowing states to continue to exercise jurisdiction over land-based injuries falling under LHWCA, the Court made clear the continued vitality of *Davis*. *Id.* at 720-722; *Perini*, 459 U.S. at 309 n. 19, 322-23; 4 Larson, *supra*, § 89.73 at 16-412 (The "Court meant [*SunShip*] not merely to extend the concurrent-jurisdiction doctrine to the new land areas covered [by LHWCA], but to preserve it to the navigable waters areas it had been applied to."). In fact, the Court placed importance on the legislative history's failure to express an intention to overrule *Davis* and *Calbeck*—calling it "a significant omission in light of the care which the Reports elsewhere take in identifying the Supreme Court cases to be overturned by the abolition of longshoremen's actions for unseaworthiness." *Id.* at 722.

In 1984 Congress again overhauled LHWCA. In the course of the legislative proceedings Congress considered amending § 905(a) of LHWCA to preclude a worker eligible for LHWCA benefits from receiving an award under a state compensation statute. The proposed amendment provided that the "liability of an employer prescribed in section [90]4 shall be exclusive and in place of all other liability *including any liability imposed by or arising out of any other workers' compensation law* . . . ." S. Rep. No. 98-81, 98th Cong., 1st Sess., at 50 (1983); H.R. Rep. No. 98-570, 98th Cong., 1st Sess., at 26 (1983). This amendment passed the Senate but was not adopted by the House of Representatives or the con-

ference, and did not become law. H.R. Conf. Rep. No. 1027, 98th Cong., 2d Sess., at 23-24 (1984), *reprinted in* 1984 U.S. Code Cong. & Admin. News 2773-74. Congress did, however, amend LHWCA by adding a section providing that "any amounts paid to an employee for the same injury . . . for which benefits are claimed under this chapter pursuant to any other workers' compensation law or [the Jones Act] . . . shall be credited against any liability imposed by this chapter." 33 U.S.C. § 933(c).[15] Hence, the 1984 amendments did not amend LHWCA to overrule the holding in *Sun Ship*.

B.

The foregoing case law indicates that the Virgin Islands could validly provide Peter with a workmen's compensation remedy if he had been exposed to jet fuel only on the dock during the "hose around." *Nordenholt*, 259 U.S. at 263. Moreover, based on the concept of including within the twilight zone of concurrent jurisdiction "all waterfront cases involving aspects pertaining both to the land and to the sea." *Moore's Case*, 80 N.E.2d at 481, Peter's injuries might be in the twilight zone even if he had been exposed to jet fuel only while on board loading the tankers from a land based hose, given his land-based status and the fact that tasks related to loading comprised but a part of his duties. Whether or not that be true, however, given the pragmatic approach of the Supreme Court in this area, we are confident that this is a twilight zone case since substantial portions of the injury-causing exposure occurred on the dock and it

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[15] What legislative history exists with respect to this provision indicates that members were focusing on the prevention of double recovery of workmen's compensation benefits. There is no indication that Congress focused, one way or another, on state tort damages. S. Rep. No. 98-81, 98th Cong., 1st Sess., 30 (1983); 130 Cong. Rec. H2488 (daily ed. April 9, 1984) (Explanation of House Amendment to S. 38, The Longshoremen's and Harbor Workers Act Amendments of 1983).

would be unreasonable to require the injured worker to demonstrate precisely how much of his injury is attributable to shoreside exposure. Thus, as an initial step in our analysis, we conclude that the Virgin Islands could provide a workmen's compensation remedy to an injured longshoreman whose injury results from exposure to a toxic substance while loading vessels over an extended period of time where a substantial amount of the exposure occurred on land. As a result, we reject Hess's argument that, under *Jensen*, federal maritime law preempts application of any state law to Peter's injury.

C.

In this case, however, we deal not with an award of compensation benefits but with a common law action for negligence. The more difficult issue raised by Hess turns on the effect of § 905(a) upon the availability of state tort relief for a plaintiff whose injury falls within the twilight zone. This raises a question of federal supremacy that requires us to consider whether LHWCA (1) evidences a congressional intent to preempt the entire area of compensation for this kind of injury, or (2) is inconsistent with the provisions of a state tort remedy so that it would be impossible for the defendant to comply with both federal and state law, or (3) whether the state tort remedy "stands as an obstacle to the accomplishment of the full purposes and objectives of Congress." *Schneidewind v. A.N.R. Pipeline Co.*, 485 U.S. 293, 108 S.Ct. 1145, 1150-51 (1988). We believe that *Sun Ship* rules out any argument that LHWCA was intended to preempt any state legislation effecting events occurring within the twilight zone. Moreover, we think it clear that it is not impossible for Hess to comply with both LHWCA and the Virgin Islands law relied upon by Peter. This leaves Hess' contention that the district court's application of Virgin Islands law in this case frustrates the "full purposes and objectives of Congress"

as reflected in LHWCA. We focus our inquiry on that issue.

In addressing this issue, we acknowledge that the Supreme Court has counseled courts not to strike down state regulation in the admiralty area, "absent a clear conflict with the federal law." *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325, 341 (1973); *see also Executive Jet Aviation v. City of Cleveland*, 409 U.S. 249, 272-273 (1972). At the same time, however, while "states may sometimes supplement federal maritime policies, a state may not deprive a person of any substantial admiralty rights as defined in controlling acts of Congress or by interpretative decisions of this Court." *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 409-410 (1953).[16] If § 905(a) was intended by Congress to confer immunity on an employer from state as well as federal negligence liability, Hess has been deprived of a federally guaranteed right and Peter's judgment cannot stand.

In determining the reach of § 905(a), we begin by considering its language:

> The liability of an employer . . . shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone *otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death* . . . .

33 U.S.C. § 905(a) (emphasis added). This section's plain language evinces an unmistakable intention to cod-

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[16] Thus, it has been held that the exclusively clause in a state workmen's compensation statute may not be raised as a bar to a maritime cause of action. *Purnell v. Norned Shipping B.V.*, 801 F.2d 152 (3d Cir. 1986), *opinion on rehearing*, 804 F.2d 248 (3d Cir. 1986), *cert. denied*, 480 U.S. 934 (1987); *Thibodaux v. Atlantic Richfield Co.*, 580 F.2d 841 (5th Cir. 1978).

ify the *quid pro quo* that underlies most workmen's compensation statutes—the employer provides no-fault compensation in exchange for immunity from tort liability for damages.

Indeed, the Supreme Court has often opined that the LHWCA embraces this *quid pro quo*:

> the Act is not a simple remedial statute intended for the benefit of the workers. Rather, it was designed to strike a balance between the concerns of the longshoremen and harbor workers on the one hand, and the employers on the other. Employers relinquished their defenses to tort actions in exchange for limited and predictable liability. Employees accept the limited recovery because they receive prompt relief without the expense, uncertainty, and delay that tort actions entail.

Morris-Knudson Construction Co. v. Director, OWCP, 461 U.S. 624, 636 (1983); *see also Potomac Electric Power Co. v. Director, OWCP*, 449 U.S. 268, 281-282 & n.24 (1980); *Ryan*, 350 U.S. at 129. The Supreme Court has enforced this *quid pro quo* by denying a negligence recovery under the Federal Employers' Liability Act, 45 U.S.C. §§ 51-60, to railroad workers covered by the LHWCA. *Schwalb*, 110 S.Ct. 381; *Pennsylvania R.R. Co. v. O'Rourke*, 344 U.S. 334 (1952); *Nogueira v. New York, New Haven & Hartford R.R. Co.*, 281 U.S. 128 (1930); *see also Harmon v. Baltimore & Ohio R.R.*, 741 F.2d 1398 (D.C. Cir. 1984).

In the context of the policy decision reflected in § 905 (a), we are unable to distinguish state imposed negligence liability from federally imposed negligence liability, and Peter has tendered no suggestion as to why Congress might have wanted to grant immunity from the latter and not the former. Peter's judgment based on Virgin Islands' law is every bit as disruptive of Congress' *quid pro quo* as would be a negligence judgment based on fed-

eral maritime law. Accordingly, we do not find it surprising that the only court of appeals to have considered the issue has concluded that § 905(a) bars a state tort recovery from a LHWCA employer. *Rosetti v. Avondale Shipyards, Inc.*, 821 F.2d 1083 (5th Cir. 1987), *cert. denied*, 484 U.S. 1008 (1988); *Lorton v. Diamond M Drilling Company*, 540 F.2d 212 (5th Cir. 1976).[17]

Peter's argument against preemption rests primarily on *Sun Ship* and *Hahn* and this has occasioned our extended review of the case law necessary to put those cases in proper perspective. As we have noted, *Sun Ship* holds that in the twilight zone a state workmen's compensation remedy is not preempted even though it provides greater

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[17] Two state Supreme Courts have addressed a very similar question, and have reached conflicting results. In *Poche v. Avondale Shipyards, Inc.*, 339 So.2d 1212 (La. 1977), *appeal dismissed for want of jurisdiction*, 434 U.S. 803 (1977), the Louisiana Supreme Court held that survivors of a land-based ship repair worker could sue the decedent's employer's officers and his fellow servants under Louisiana law. Though LHWCA compensation was clearly available, and LHWCA bars such actions, LHWCA was held not to bar this suit since the case was in the realm of concurrency and the court felt it was "obvious that unless the state statute provides benefits or rights beyond those accorded by federal law, there would be no reason to elect to pursue the state remedy." *Id.* at 122. *But see Sider v. Robin Temporary Service*, 515 So.2d 1123 (La. Ct. App. 1987) (section 905(a) of LHWCA barred state negligence claim against borrowing employer of worker injured while cleaning barge on Mississippi River), *writ denied*, 519 So.2d 146 (La. 1988).

The Alabama Supreme Court, on the other hand, held that a worker injured on land could not pursue a state law negligence claim against his fellow employee where LHWCA applied, stating:

> We can perceive no greater conflict than that which would be presented if we allowed this employee to sue his co-employee because he was a land-based maritime worker, and a maritime worker injured on a navigable water would be precluded from maintaining such a suit: therefore we are persuaded to hold that the exclusivity provisions of [LHWCA] apply and that the state action is barred.

Fillinger v. Foster, 448 So.2d 321, 326 (Ala.), *cert. denied*, 469 U.S. 872 (1984).

compensation for the employee than is provided by LHWCA. This holding, however, emanated from a concern that a return to the exclusivity of compensation remedies would recreate on land what the "maritime but local" dilemma had created over the navigable waters. 447 U.S. at 720 & 725. The Court recognized that to ensure that every worker had access to a no-fault remedy, it was necessary to refrain from holding that the availability of a federal compensation remedy excluded the possibility of a compensation remedy under state law. *Id.* at 725.

LHWCA itself, however, is a recognition that there is a substantial difference between liability for a fixed and determinable compensation award and liability for unlimited damages in tort. The Act is premised on the notion that employers will accept the burden of no-fault compensation recovery in exchange for predictable liability for injuries suffered by workers. Though the Supreme Court has held that the 1972 amendments were not an expression of Congress' intent to make LHWCA the exclusive source of compensation for longshoreman, the legislative history of the 1972 amendments does make clear that Congress was motivated by two relevant considerations. First, Congress intended that compensation, not tort damages, were to be the primary source of relief for workplace injuries for longshoremen against their employers. Second, Congress believed that the incentives for tort litigation created by the *Sieracki-Ryan-Reed* case law had done little to aid maritime workers or the public interest.

Concurrent jurisdiction in the "twilight zone" is a judicial construct borne of necessity and designed to eliminate the harshness of the maritime but local era. The boundaries of this doctrine should be determined by the problems that gave rise to its creation and we decline to apply it in a way that would undermine the policy reflected in § 905(a).

The *Hahn* case is the only federal case since the enactment of LHWCA to sanction a state tort recovery for an injury within the scope of that Act. While the Supreme Court there sustained a damage recovery, the Court's holding is not persuasive authority for Peter's position in this case. The Oregon statute involved in *Hahn*, like most workmen's compensation statutes—including LHWCA—provided that if an employer covered by statute failed to secure workmen's compensation coverage it would be subject to a negligence action in which it would be denied common law defenses. 358 U.S. at 273. The employer in *Hahn* had not obtained such coverage and it was under this provision that the damage judgment was obtained against it.

Thus, in *Hahn* the state negligence liability was part of the state's workmen's compensation scheme and was imposed only as a sanction for the employer's failure to secure coverage. The existence and function of that liability was entirely consistent with Congress's intent to ensure a seamless intersection between state and federal compensation coverage. That negligence liability in this context is entirely consistent with the scheme imposed by LHWCA is apparent from Congress's inclusion of a similar sanction in LHWCA.

Here, Hess arranged coverage for Peter under both LHWCA and the Virgin Islands' compensation Act. The application of Virgin Islands tort law in situations like this does not further the availability of no-fault compensation for injured maritime workers: it simply obstructs the purposes of LHWCA by depriving maritime employers of their side of LHWCA's *quid pro quo*.

We hold that where an employer has obtained workmen's compensation coverage for its LHWCA employer under both the LHWCA and the state or territorial statute, § 905(a) and the Supremacy Clause bar a state or territorial tort recovery against the employer.

IV.

We conclude that (1) Peter was a "borrowed servant" and Hess an "employer" under LHWCA, (2) Peter's injuries were compensable under LHWCA, and (3) § 905 (a) and the Supremacy Clause bar the Virgin Islands from imposing negligence liability on Hess. Accordingly, we will reverse and remand with instructions that judgment be entered for Hess.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 88-3797 and 88-3798

CONRAD PETER,
Appellant in No. 88-3797

vs.

HESS OIL VIRGIN ISLANDS CORP.,
Appellant in No. 88-3798

BEFORE: HIGGINBOTHAM, STAPLETON,
and SCIRICA, *Circuit Judges*

SUR PETITION FOR PANEL REHEARING

The petition for rehearing filed by Appellant, Conrad Peter, in the above-entitled case having been submitted to the judges who participated in the decision of this court and no judge who concurred in the decision having asked for rehearing, the petition for rehearing is denied.

By the Court,

/s/ Walter K. Stapleton
Circuit Judge

Dated: August 17, 1990

STATEMENT SUR DENIAL OF PETITION FOR PANEL REHEARING

This matter comes before us again upon the petition of the plaintiff Conrad Peter for rehearing of this appeal before the panel. Upon the initial hearing of this matter, we held that Peter could not recover a common law tort verdict under Virgin Islands law against Hess because such a remedy was preempted by the Longshore and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. § 901 *et seq.* *See Peter v. Hess Oil Virgin Islands Corp.*, 903 F.2d 935 (3d Cir. 1990). In support of his present petition, Peter raises for the first time on appeal the argument that LHWCA does not apply to the territorial waters of the Virgin Islands.

The plain language of LHWCA, 33 U.S.C. §§ 903(a), 902(8),(9), extends the Act's coverage to the waters of United States territories. The Virgin Islands are a territory of the United States. 48 U.S.C. § 1541(a); *cf.* *Sarauw v. Oceanic Navigation Corp.*, 655 F.2d 526 (3d Cir. 1981) (affirming a verdict under LHWCA, 33 U.S.C. § 905(b), awarded to a dockworker injured on a gangway connecting a ship to the dock at Hess' St. Croix refinery). Based on this fact and the absence of any argument to the contrary in the briefing, we assumed in our opinion that Peter's alleged injury was compensable under LHWCA. However, Peter has now produced for us a number of letters and memoranda written by employees of the Office of Workers' Compensation Programs ("OWCP"), the office to which the Secretary of Labor has delegated his statutory authority to administer LHWCA, interpreting LHWCA as not applying to the territorial waters of the Virgin Islands.[1] Peter insists

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[1] This view is based primarily on the fact that the Virgin Islands were a possession rather than a territory at the time LHWCA was originally enacted.

that we must give deference to this interpretation.[2] *Phillips v. Marine Concrete Structures, Inc.*, 877 F.2d 1231 (5th Cir. 1989) (deference is owed to the Director of OWCP's interpretation of LHWCA), *vacated on other grounds*, 895 F.2d 1033 (5th Cir. 1990) (en banc).

We decline to grant panel rehearing to address this argument at this juncture of the litigation. Peter raised his argument about the applicability of LHWCA to the Virgin Islands in the district court, but he did not do so before this court. He was required to do so if he wished this court to address that argument. *See* F.R. App. P. 28(b) (appellee's brief on appeal shall adhere to F.R. App. P. 28(a)(4) and "contain the contentions of the [appellee] with respect to the issues presented" on appeal); *In re Sugar Antitrust Litigation*, 579 F.2d 13, 20 (3d Cir. 1978) (refusing to grant rehearing to deal with issues not raised in the district court or briefed on appeal); *see also, Lowry v. Bankers Life and Casualty Retirement Plan*, 871 F.2d 522, 525 (5th Cir. 1989) (refusing to address an argument made for the first time in an application for rehearing), *cert. denied*, 110 S.Ct. 152 (1989); *Dean v. Dean*, 837 F.2d 1267 (5th

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[2] While we expressly decline to express an opinion on whether LHWCA covers the territorial waters of the Virgin Islands, we note the absence of any evidence or representation that the OWCP has failed to process a claim for LHWCA benefits originating in the Virgin Islands. To the contrary, Hess has filed affidavits and other evidence indicating that the OWCP has processed several LHWCA claims filed by Hess employees injured at Hess' refinery in the Virgin Islands, and that Hess has paid LHWCA benefits to these employees. Indeed, the OWCP threatened on one occasion to assess a civil penalty against Hess under LHWCA, 33 U.S.C. § 930(c), because Hess had failed to submit a timely report about an injury to a Hess worker which occurred at its St. Croix refinery and was said to be within the purview of LHWCA. Nevertheless, it appears true that at least the *declarations* of the OWCP and its predecessor have not been altogether consistent. Clarification of the agency's position on this issue would go a long way towards alleviating the resulting uncertainty that has been created for employers and employees in the Virgin Islands.

Cir. 1988) (same): *Rodriquez de Quinonez v. Perez*, 596 F.2d 486, 492 (1st Cir. 1979) (refusing to grant rehearing where there was no excuse for counsel's failure to raise a legal argument at the proper time), *cert. denied*, 444 U.S. 840 (1979); *Jamestown Farmers Elevator, Inc. v. General Mills*, 552 F.2d 1285, 1294-95 (8th Cir. 1977) (refusing to entertain an argument first raised in a petition for rehearing). Furthermore, Peter's counsel has proffered no legitimate excuse for failing to raise this argument in a timely manner, and contrary to his assertions, this argument does not implicate the subject matter jurisdiction of this court. We have jurisdiction to decide this appeal without regard to whether LHWCA applies or does not apply to the territorial waters of the Virgin Islands. *See* 28 U.S.C. § 1294(3). In these circumstances, we refuse to delay the disposition of other appeals by granting panel rehearing to address this tardily raised contention.[3]

As the petition for panel rehearing filed by Conrad Peter in this appeal has been submitted to the judges who participated in the decision of this court and no judge who concurred in the decision has asked for rehearing. Peter's petition for panel rehearing will be denied. By separate order, Peter's petition for rehearing in banc has also been denied.

By the Court,

/s/ Walter K. Stapleton
Circuit Judge

Dated: August 17, 1990

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[3] We have considered Peter's other grounds for seeking rehearing before the panel and find that they do not justify a rehearing before the panel.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 88-3797 and 88-3798

CONRAD PETER,
Appellant in No. 88-3797

vs.

HESS OIL VIRGIN ISLANDS CORP.,
Appellant in No. 88-3798

SUR PETITION FOR REHEARING

BEFORE: HIGGINBOTHAM, *Chief Judge*, SLOVITER, BECKER, STAPLETON, MANSMANN, GREENBERG, SCIRICA, HUTCHINSON, COWEN, NYGAARD, and ALITO, *Circuit Judges*

The petition for rehearing filed by Appellant, Conrad Peter, in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/ Walter K. Stapleton
Circuit Judge

Dated: August 17, 1990

APPENDIX D

IN THE DISTRICT COURT
OF THE VIRGIN ISLANDS
DIVISION OF SAINT CROIX

CONRAD PETER,

Plaintiff,

v.

HESS OIL VIRGIN ISLANDS CORPORATION,

Defendant.

Civil No. 1986/221

VERDICT OF THE JURY

We, the jury impanelled and sworn to try the issues between CONRAD PETER, Plaintiff and HESS OIL VIRGIN ISLANDS CORPORATION, Defendant, find in favor of Plaintiff, CONRAD PETER and award him compensatory damages in the total sum of $1.5 million.

We further find contributory negligence on the part of plaintiff, CONRAD PETER and fix his percentage at 20%.

We reduce the above award of compensatory damages by the percentage of negligence of plaintiff, CONRAD PETER and award him the difference $1.2 million.—80%.

We further find that Plaintiff is entitled to an award of punitive damages and award him, as punitive damages, the sum of $—0—.

Dated: June 24, 1988

APPENDIX E

IN THE DISTRICT COURT
OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX

CONRAD PETER,
Plaintiff,

v.

HESS OIL VIRGIN ISLANDS CORPORATION,
Defendant.

Civil No. 1986/221

JUDGMENT

This matter was tried before a jury with each party represented by their respective counsel. At the conclusion of the testimony the jury rendered a verdict in favor of the Plaintiff in the amount of $1,500,000.00 but reduced the amount by twenty percent due to the Plaintiff's contributory negligence, leaving a total sum owing the Plaintiff, $1,200,000.00.

Thus, it is hereby

ORDERED,

That judgment shall be and hereby is entered in favor of the Plaintiff in the amount of $1,200,000.00.

/s/ Almeric L. Christian
ALMERIC L. CHRISTIAN
Senior District Judge

Dated: October 31, 1988

APPENDIX F

IN THE DISTRICT COURT
OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX

CONRAD PETER,

Plaintiff,

v.

HESS OIL VIRGIN ISLANDS CORPORATION,

Defendant.

Civil No. 1986/221

ORDER

Virtually on the eve of trial this Court was confronted with a slew of motions filed on behalf of defendant. Because these motions, hard on the heels of the denial of the motion for a continuance were untimely, the Court took the position that it would go forward with the scheduled trial. However, because the defense insisted that its motion to dismiss or in the alternative for summary judgment raised a question of subject matter jurisdiction, the Court decided that if such was the case it would, upon its consideration of the motion after trial, rule as the situation warranted since a motion address to jurisdiction could be raised at any time.

Contrary to the insistence of plaintiff, the issue raised by the motion of defendant is not one that should have been pleaded as an affirmative defense, and because not so pleaded should be deemed waived. This Court is satisfied that the defendant is correct that the Court is confronted with a question of subject matter jurisdiction.

The Court is inclined to agree with the defendant that based on the work performed by Conrad Peter, the plaintiff in this case, he falls within the definition of a longshoreman. Further, on principle as well as on legal authority the Court must agree with defendant that in an appropriate case the so-called borrowed servant defense would be available in a trial brought under the Longshoremen's and Harbor Workers' Compensation Act.

Where the Court parts company with the defense is as to the applicability of these principles to the instant case. Oddly enough, the Court was initially led to its resolution of the question raised upon its reading in a reply memorandum of defendant that "the Supreme Court has ruled that for *land-based* injuries arising from maritime employment, the states may apply their own workers' compensation statutes", citing for this proposition *Sun Ship, Inc. v. Pennsylvania*, 447 U.S. 715, 716 (1980). It is on this authority that we hold that the work being performed by Conrad Peter which resulted in his injuries were land-based, and that, therefore, the Federal law does not provide an exclusive remedy and in no way preempts the Virgin Islands law. It follows, therefrom, that Peter could proceed to litigate his claim under the workmen's compensation laws of the Virgin Islands. Since, unquestionably, that law has abolished the borrowed servant doctrine (see 24 V.I.C. § 263a), the motion of defendant must be denied.

In saying that Peter was injured while doing land-based work the Court recognizes, as it recalls the evidence, that some of Peter's duties required him to load vessels with the fuel which the jury found caused his injuries. However, it is the Court's recollection that this plaintiff most substantial exposure to the offending fuel was when he was on the dock engaged in disconnecting hoses. Thus to a large extent his injuries were land-based. On the authority of *Sun Ship v. Pennsylvania, supra*, therefore, the motion of defendant will be denied.

The premises considered, therefore, and the Court being fully advised,

IT IS ORDERED that the motion of defendant, Hess Oil Virgin Islands Corp., to amend its answer be, and the same is, hereby GRANTED.

FURTHER ORDERED that the motion of defendant, Hess Oil Virgin Islands Corp., to dismiss the complaint of plaintiff, Conrad Peter, or in the alternative for summary judgment, be, and the same is, hereby DENIED.

DATED: October 31, 1988

/s/ Almeric L. Christian
ALMERIC L. CHRISTIAN
Senior District Judge

APPENDIX G

IN THE DISTRICT COURT
OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX

CONRAD PETER,
Plaintiff,

v.

HESS OIL VIRGIN ISLANDS CORPORATION,
Defendant.

Civil No. 1986/221

ORDER

Defendant, Hess Oil Virgin Islands Corp., has moved the Court for judgment notwithstanding the verdict of the jury, or in the alternative for a new trial, or for remittitur. For the most part, the motion rehashes matters already raised and decided by the Court. But for the new issue introduced, the motion would be denied without comment.

In seeking a new trial (or to have a mistrial declared) defendant refers to three writings allegedly happened upon by happenstance when the court's file was being reviewed in the course of counsel's preparation for the instant motion.

In support of the motion for a mistrial, one of the attorneys representing defendant has filed an affidavit with this Court. The most charitable thing that can be

said about the affidavit is that it is wholly unbecoming of the affiant.

Firstly, the affidavit speaks of "three envelopes in the file which contained written communications by the jury." A communication is commonly understood to be some form of message from one to another. The affidavit fails to state to whom these communications were directed.

Secondly, the affidavit says that two of the envelopes were communications to the Court. If so, as the affiant well knows, those communications would have been discussed with counsel on both sides and a written response would have been prepared by the Court, the preparation of which would have been discussed with counsel and the response, in its final form, would have been read to counsel before sending the same in to the jury. The affidavit, however, makes no reference whatsoever to the Court's response to the comunications. If there were no written response by the Court, then the entire jury would have been returned to the jury box and a response given on the record in open court. Again, no mention in the affidavit as to whether the Court's response took this form.

Thirdly, the affiant well knows that what was attached to his affidavit as Exhibit C was in no way a communication to anyone, certainly not to the Court. It can hardly be that the affiant is implying that the Court received this paper during the course of the jury's deliberation and failed to bring it to counsel's attention.

Fourthly, the affidavit takes the position that its Exhibit C shows that the jury took into account impermissible matters such as income taxes and attorney's fees. That may be the affiant's conclusion. However, it defies logic and common sense for to reach such a conclusion the affiant starts from the bottom of the writing and proceeds to the top. There is no more reason

to suppose that the writer of the unsigned paper, whomever it might be, came up with the figure $300,000.00 for "contributed negligence" before arriving at a gross figure. A more likely conclusion would be that whoever the writer of the paper was, after the jury had arrived at a gross award of $500,000.00 and had deducted the 20% for the plaintiff's contributory negligence, then to satisfy his or her curiosity deducted one-third for attorney's fees and the listed amount for government taxes to see how much the plaintiff would realize. But this is all speculation as are the conclusions reached by the affiant.

More importantly, we do not know whether the writing listed as Exhibit C represents the thought processes of a single juror, several jurors, or the entire jury, and, of course, no inquiry may be made to determine what the paper truely represents. Indeed, in all the years serving this Court Exhibit C represents the first instance in which notes written by a juror have been reported as having been found in the file. Counsel for defendant well knows that notes written by jurors in the course of their deliberation do not properly form a part of the file in a given case. The Court finds it somewhat shocking that counsel for defendant would have imposed upon one of the deputy clerks of the court to give him a certification that Exhibit C was a part of the record. One can only hope that never again will there be a repetition of such conduct. In any event, insofar as this Court is concerned the defendant will in no way profit by such acts of counsel.

The premises considered and the Court being fully advised,

IT IS ORDERED that the motion of defendant, Hess Oil Virgin Islands Corp., for judgment notwithstanding the verdict, or in the alternative for a new trial or re-

mittitur, or a mistrial be, and the same is, in all respects, DENIED.

October 31, 1988

/s/ Almeric L. Christian
ALMERIC L. CHRISTIAN
Senior District Judge

APPENDIX H

IN THE DISTRICT COURT
OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX

CONRAD PETER,

Plaintiff,

v.

HESS OIL VIRGIN ISLANDS CORPORATION,

Defendant.

Civil No. 1986/221

ORDER

THIS MATTER is before the Court on a second motion of defendant, Hess Oil Virgin Islands Corp. ("HOVIC") for judgment notwithstanding the verdict or, in the alternative, for a new trial or remittitur in the above-captioned matter. HOVIC claims that it is not entirely clear that the Court ruled on HOVIC's first motion for judgment notwithstanding the verdict or new trial or remittitur at a time when a final judgment was properly entered in this matter. HOVIC's uncertainty stems from a series of orders entered by the Court, all dated October 31, 1988 (filed November 1, 1988).

The Court originally entered a final judgment in this matter on July 5, 1988 after a jury trial. However, in order to rule on a pending motion to dismiss, or alternatively, for summary judgment filed by HOVIC, the Court, by order dated October 31, 1988, vacated its judg-

ment entered July 5, 1988. In another order dated October 31, 1988, the Court denied HOVIC's motion to dismiss, or alternatively, for summary judgment. Yet another order dated October 31, 1988 entered judgment for the plaintiff, Conrad Peter, in the amount of $1,200,000.00. Still another order dated October 31, 1988 denied HOVIC's motion for judgment notwithstanding the verdict, or alternatively, for a new trial or remittitur. Although all of these orders were signed on the same date, it is clear to us that Judge Christian ruled on defendant's motion for judgment notwithstanding the verdict, new trial or remittitur after he entered judgment on October 31, 1988.

The premises having been considered, now therefore it is

ORDERED:

THAT HOVIC's second motion for judgment notwithstanding the verdict, or alternatively for a new trial or remittitur be, and hereby is, DENIED.

DATED this 29th day of November, 1988.

ENTER:

/s/ David V. O'Brien
DAVID V. O'BRIEN
Chief Judge